

## CHAPTER VII

### PERSONNEL ADMINISTRATION

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FEDERAL LAWS

#### Title VII

##### Coverage

Title VII of the Civil Rights Act of 1964 covers all municipalities that have “fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.”<sup>1</sup> A charge of discrimination under Title VII may be filed by or on behalf of any “individual employed by an employer”<sup>2</sup> or employment applicant. Independent contractors are not covered, but the distinction between an employee and an independent contractor is not always clear. Among the determining factors are the degree of the alleged employer’s right to control the manner in which work is to be done, the individual’s opportunity for profit or loss, and whether the service rendered requires a special skill.

##### Prohibited Conduct

Title VII forbids discrimination in hiring, firing, compensation, terms, conditions, or privileges of employment on the basis of race, color, religion, sex, pregnancy, or national origin. Title VII also makes it unlawful for a municipality to limit, segregate, or classify employees or applicants for employment in any way that tends to restrict employment opportunities or status because of race, color, religion, pregnancy, sex, or national origin.<sup>3</sup> Furthermore, it is unlawful to discriminate on the basis of race, color, religion, sex, or national origin in any apprenticeship, training, or retraining program<sup>4</sup> or to indicate a preference based on any of these bases in employment advertisements.<sup>5</sup>

Courts have expanded Title VII’s prohibition against sex discrimination to include sexual harassment. An employer is guilty of sexual harassment when it, its supervisors, or agents require sexual favors from an employee in return for job benefits, or when the employer (or any

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<sup>1</sup>42 U.S.C. § 2000e(b).

<sup>2</sup>42 U.S.C. § 2000e(f).

<sup>3</sup>42 U.S.C. § 2000e-2(a).

<sup>4</sup>42 U.S.C. § 2000e-2(d).

<sup>5</sup>42 U.S.C. § 2000e-3(b).

agent) creates a sexually hostile or offensive work environment that unreasonably interferes with an individual's work.<sup>6</sup> In many cases, an employer may not be aware that a supervisor or agent has sexually harassed an employee. In such cases, however, the employer may still be held liable for the acts of the supervisor or agent.<sup>7</sup> In situations involving the creation of a sexually offensive work environment, an employer may be held liable if the employer knew or should have known about the situation.<sup>8</sup>

Three different categories of discrimination under Title VII have been developed by the courts: (1) disparate treatment; (2) disparate impact; and (3) failure to accommodate reasonably an employee's religious observance or practices. The disparate treatment analysis is most frequently employed by the courts. Under this theory, it is unlawful to treat a person less favorably because of the person's race, sex, religion, or ethnic group unless there is a legitimate, non-discriminatory reason for the difference in treatment.

A plaintiff who alleges disparate treatment in hiring has the burden of proving that: (1) he belongs to a protected group; (2) he applied and was qualified for a job for which applicants were being sought; (3) he was rejected despite his qualifications; and (4) the position remained open after his rejection and applicants with the plaintiff's qualifications continued to be sought. This same burden of proof applies to allegations of disparate treatment in other areas such as discharge, discipline, and promotion on the basis of race, color, religion, sex, or national origin. After the plaintiff has met this burden, the employer must show that there was a legitimate, non-discriminatory reason for his action regarding the plaintiff. The plaintiff is then given an opportunity to show that the employer's stated reason was a pretext for the alleged discriminatory act.<sup>9</sup> The plaintiff does not have to introduce additional, independent evidence of discrimination.<sup>10</sup> The "plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false" may permit the jury to decide that the employer unlawfully discriminated.<sup>11</sup>

A "mixed-motive" disparate treatment case is one in which a plaintiff proves that race, gender, etc. was a "motivating factor" in the challenged employment decision. In such a case, the employer must prove by a preponderance of the evidence that the employment decision would

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<sup>6</sup>29 C.F.R. § 1604.11(a).

<sup>7</sup>*Id.*; See also *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Sims v. Brown and Root Industrial Services, Inc.*, 889 F.Supp. 920 (W.D. La. 1995).

<sup>8</sup>*Henson v. City of Dundee*, 682 F.2d 897 (11<sup>th</sup> Cir. 1982); *Waltman v. International Paper Co.*, 875 F.2d 468 (5<sup>th</sup> Cir. 1989).

<sup>9</sup>*Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5<sup>th</sup> Cir. 1996).

<sup>10</sup>*Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

<sup>11</sup>*Id.* at 148.

have been the same even if the prohibited factor had not been considered.<sup>12</sup>

Another theory of discrimination, disparate impact, involves employment practices that are fair in form but operate more harshly on a protected group than on the unprotected. There are three such employment practices: scored tests, non-scored objective criteria, and subjective criteria. A plaintiff who alleges that any of these employment practices is discriminatory has the burden of showing that the application of a *specific* employment practice disqualifies a disproportional high percentage of employees or applicants in a particular racial, sexual, religious, or ethnic group.<sup>13</sup> This burden can be met by the use of statistics alone but statistical proof is usually bolstered by proof of specific instances of discrimination.<sup>14</sup> Relevant statistics compare the racial, gender, religious, or ethnic composition of the jobs at issue with the composition of the qualified population in the relevant job market.<sup>15</sup>

After the plaintiff meets his burden, an employer who is defending a scored test or non-scored objective criteria, such as a high school diploma requirement, must show that the test or requirement at issue is related to the job for which it is used and is therefore a business necessity.<sup>16</sup> Usually, an expert is needed to show job-relatedness. An employer who is defending the use of subjective criteria, such as supervisory evaluations, must show that the use of this criteria is necessary.<sup>17</sup>

The final theory of discrimination under Title VII involves an employer's affirmative duty to accommodate the religious practices of employees. An employee who alleges this type of discrimination must show that his religious belief is sincerely held and that the belief is the cause of an unfavorable employment decision. The employer must then show that it would cause an undue hardship on the conduct of his business to accommodate the employee's religious

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<sup>12</sup>*Hopkins v. Price Waterhouse*, 109 S.Ct. 1775 (1989); *Brown v. East Mississippi Electric Power Assn.*, 989 F.2d 858 (5<sup>th</sup> Cir. 1993).

<sup>13</sup>*Griggs v. Duke Power*, 401 U.S. 424 (1971).

<sup>14</sup>*International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Anderson v. Douglas & Lomason Co., Inc.*, 26 F.3d 1277 (5<sup>th</sup> Cir. 1994).

<sup>15</sup>*Wards Cove Packing Co. v. Antonio*, 109 S.Ct. 2115 (1989); *Watson v. Fort Worth Bank & Trust Co.*, 108 S.Ct. 2777 (1988); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Griggs v. Duke Power*, 401 U.S. 424 (1971).

<sup>16</sup>*Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Bernard v. Gulf Oil Corp.*, 890 F.2d 735 (5<sup>th</sup> Cir. 1989).

<sup>17</sup>*Watson v. Fort Worth Bank & Trust Co.*, 108 S.Ct. 2777 (1988); *Rowe v. General Motors Corp.*, 457 F.2d 348 (5<sup>th</sup> Cir. 1972).

practice.<sup>18</sup>

### Procedure

The Equal Employment Opportunity Commission (EEOC) administrative process is begun by filing a charge of discrimination within 180 days of the last alleged discriminatory act. The EEOC will investigate the charge and may then conduct an on-site review or hold a “fact-finding conference with the charging party, the party against whom the charge was filed and their witnesses, to determine if there is reasonable cause to believe the charge is true. If no cause is found, the EEOC investigation ends and the charging party has 90 days to sue in federal district court.

If cause is found, the EEOC attempts to settle the charge and, if no settlement is reached, either the Attorney General files suit on behalf of the charging party or the charging party is issued a “right to sue” letter.

### Liability Exposure

If an employer loses a Title VII suit, that employer may be required to reinstate the plaintiff and to grant all back pay and employment-related benefits the court finds the plaintiff lost because of the unlawful discrimination. However, if the employment relationship has been so poisoned as to render re-employment inappropriate, the employer may be required to pay the plaintiff “front pay” in lieu of reinstatement. An employer may be held liable for back pay accruing from a date two years prior to the filing of the charge and for the plaintiff’s attorneys’ fees.<sup>19</sup>

Prior to the 1991 amendments to Title VII, employment discrimination cases were tried by a judge sitting without a jury. The Civil Rights Act of 1991 changed this so that now jury trials are available in employment discrimination cases arising after November 21, 1991.<sup>20</sup> This has generally increased employers exposure to large damage awards. Furthermore, compensatory damages are now available to prevailing plaintiffs for any emotional distress injuries they are found to have received as a result of the employers’ unlawful discrimination. The 1991 amendments also provide for plaintiff’s expert witness fees to be paid if the employer loses.

Suits that allege that an employer has engaged in a pattern or practice of resistance to the rights protected by Title VII have potential for massive liability. Municipalities that refuse to hire females for their fire or police departments are particularly susceptible to such suits. Pattern and practice suits are brought by the EEOC and can subject an employer to liability for back pay and

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<sup>18</sup>*Trans World Airlines v. Hardison*, 432 U.S. 63 (1977); *Eversley v. MBANK Dallas*, 843 F.2d 172 (5<sup>th</sup> Cir. 1988).

<sup>19</sup>42 U.S.C. § 2000e-5(g)(k); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Sellers v. Delgado Community College*, 839 F.2d 1132 (5<sup>th</sup> Cir. 1988).

<sup>20</sup>42 U.S.C. § 2000e.

employment for all affected applicants and past as well as present employees.<sup>21</sup>

## Americans with Disabilities Act

### Coverage

The Americans With Disabilities Act (ADA) became effective on July 26, 1992. The Act applies to all municipalities employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

### Prohibited Conduct

The Act forbids an employer from discriminating “against a qualified individual with a disability because of the disability of such individual in regards to job application procedures; the hiring, advancement, or discharge of employees; and employee compensation, job training, and other terms, conditions, and privileges of employment.”<sup>22</sup> A “qualified individual with a disability” means an individual with a disability who satisfies the requisite skill, experience, education, and other jobs-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.<sup>23</sup> The term “disability” means, with respect to an individual, “(A) A physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.”<sup>24</sup>

The determination of whether an individual is disabled should be made with reference to measures that mitigate the individual’s impairment.<sup>25</sup> If a person is taking measures to correct or mitigate a physical or mental impairment, “the effects of those measures – both positive and negative – must be taken into account when determining whether that person is ‘substantially limited’ in a major life activity and thus ‘disabled under the Act.’”<sup>26</sup>

The ADA requires individuals claiming the Act’s protection to prove disability by offering evidence that the extent of the limitation in terms of their own experience is substantial.<sup>27</sup>

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<sup>21</sup>*General Telephone Co. v. EEOC*, 446 U.S. 318 (1980).

<sup>22</sup>42 U.S.C. 12112(a).

<sup>23</sup>29 C.F.R. §1630.2(m).

<sup>24</sup>42 U.S.C. 12102(2).

<sup>25</sup>*Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

<sup>26</sup>*Id.* at 481.

<sup>27</sup>*Albertson’s Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

The final regulations promulgated to accompany the ADA define “physical or mental impairment” as:

- (1) Any physiological disorder, or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic lymphatic, skin and endocrine; or
- (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.<sup>28</sup>

The regulations also define “major life activities” to include functions such as “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.”<sup>29</sup>

The ADA also specifically excludes certain impairments from its coverage, including homosexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and current illegal drug use.<sup>30</sup>

The Act lists the following as examples of prohibited discrimination:

- (1) limiting, segregating, or classifying disabled individuals;
- (2) participating in an arrangement or relationship, contractual or otherwise, that has the effect of subjecting a qualified applicant or employee with a disability to discrimination;
- (3) Utilizing standards or methods of administration that have the effect of discriminating against disabled individuals or that “perpetuate the discrimination of others who are subject to common administrative control;”
- (4) excluding or denying jobs or benefits because of an individual’s relationship or association with a disabled person;
- (5) failing to accommodate disabilities, unless it can be shown that the accommodation would impose an undue hardship on the operation of the

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<sup>28</sup>29 C.F.R. §1630.2(h).

<sup>29</sup>29 C.F.R. §1630.2(I).

<sup>30</sup>29 C.F.R. 1630.3(d).

employer;

- (6) using employment tests, standard or selection criteria that tend to screen out individuals with disabilities unless the criteria is shown to be job related for the position in question and is consistent with a business necessity; and
- (7) failing to administer employment tests in a manner that accurately reflects the skill, aptitude, or whatever other factor the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of disabled employees or applicants.<sup>31</sup> The Act also forbids retaliation against an applicant or employee for opposing handicapped discrimination or participating in investigations or proceedings under the Act.<sup>32</sup>

The ADA also requires employers to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless (the employer) can demonstrate the accommodations would impose an undue hardship on the operation of the business. . . .”<sup>33</sup> Reasonable accommodation might include: making existing facilities used by employees readily accessible to and usable by individuals with disabilities; job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modification of examinations, training material, or policies; and provisions of qualified readers or interpreters.<sup>34</sup> The duty to reasonably accommodate an individual with a disability does not require an employer to bear “undue hardship,” which means an action requiring “significant difficulty or expense.”<sup>35</sup> In considering whether an accommodation would impose an undue hardship on an employer, the following factors must be considered: (1) the nature and net cost of the accommodation required; (2) the overall size of the business with respect to the number of employees, the number and type of facilities, and the size of the budget; (3) the type of business operation, including the compensation and structure of the work force; and (4) the impact of the accommodation upon the operation of the business, including the impact on the ability of other employees to perform their duties.<sup>36</sup>

The ADA also restricts inquiries about the health and fitness of applicants and employees. Specifically, the Act forbids a covered entity to “conduct a medical examination or make inquires of a job applicant or employee as to whether such applicant or employee is an individual

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<sup>31</sup>42 U.S.C. 12112(b); 29 C.F.R. 1630.5-.11.

<sup>32</sup>42 U.S.C. 12203.

<sup>33</sup>42 U.S.C. 12112(b)(5)(A).

<sup>34</sup>29 C.F.R. 1630.2(o)(2).

<sup>35</sup>29 C.F.R. 1630.2(p).

<sup>36</sup>29 C.F.R. 1630.2(p)(2).

with a disability or as to the nature or severity of such disability.”<sup>37</sup>

However, the Act does allow limited preemployment inquiries into an applicant’s ability to perform a job-related function. An employer may also condition a job offer on results of a physical or mental examination if (1) all new employees are subject to the examination, (2) the information is kept confidential and in separate medical files, and (3) examination results are used only in accordance with the Act.<sup>38</sup>

The ADA allows employers to prefer some physical attributes over others and to establish physical criteria.<sup>39</sup> An employer is free to decide that “physical characteristics or medical conditions that do not rise to the level of an impairment – such as one’s height, build, or singing voice – are preferable to others.”<sup>40</sup>

Municipalities are generally prohibited from requiring that existing employees undergo medical examinations unless the examination is shown to be job-related and consistent with business necessity.<sup>41</sup>

Finally, municipalities are free to prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees and may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such municipality holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism.<sup>42</sup> Furthermore, for the purposes of the ADA, a test to determine the illegal use of drugs shall not be considered a medical examination.

### Liability Exposure

A violation of the ADA gives rise to liability by the municipality which is identical to liability for violations of Title VII.<sup>43</sup>

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<sup>37</sup>29 C.F.R. 1630.13.

<sup>38</sup>42 U.S.C. 12112(d)(3).

<sup>39</sup>*Sutton, supra* note 25, at 490.

<sup>40</sup>*Id.*

<sup>41</sup>42 U.S.C. 12112(d)(4).

<sup>42</sup>42 U.S.C. 12114(c).

<sup>43</sup>See section above for a discussion of Title VII.

## Family and Medical Leave Act

### Coverage

The Family and Medical Leave Act of 1993 (FMLA) applies to all municipalities regardless of the number of employees employed.<sup>44</sup> For an employee to be eligible for family and medical leave, he must have been employed for at least 12 months and have worked 1,250 hours for the municipality during the previous 12 months period.<sup>45</sup>

All eligible employees are permitted a total of 12 work weeks of unpaid leave during any 12 month period for one or more of the following events: (1) the birth of and to care for a son or daughter of the employee; (2) the placement of a son or daughter with the employee for adoption or foster care; (3) in order to care for the spouse, son, daughter, or parent of the employee, if such person has a serious health condition, or to care for a child over 18 years of age who has a serious health condition and is incapable of self-care because of a mental or physical disability; and (4) because of a serious health condition that makes the employee unable to perform the functions of his position.<sup>46</sup> The entitlement to leave for the birth or placement of a son or daughter must be taken within a 12-month period from the date of the child's birth.<sup>47</sup>

If the employer employs a husband-wife team and both are otherwise eligible for FMLA leave, they are entitled only to 12 weeks between them for a birth or placement of a child for adoption or foster care, or to care for a seriously-ill parent.<sup>48</sup> The limitation does not apply, however, to leave taken by either spouse to care for the other who is seriously ill and unable to work, to care for a child with a serious health condition, or for his own serious illness.<sup>49</sup>

A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves (1) in-patient care in a hospital, hospice, or residential medical care facility, including any period of incapacity or a subsequent treatment in connection with such in-patient care or; (2) continuing treatment by a health care provider which requires the continuous absence from work for a period of more than three calendar days; or (3) continuing treatment by

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<sup>44</sup>29 C.F.R. 825.104(a).

<sup>45</sup>29 C.F.R. 825.110(d).

<sup>46</sup>29 U.S.C. 2612(a)(1).

<sup>47</sup>29 U.S.C. 2612(a)(2).

<sup>48</sup>29 C.F.R. 825.202(a). This limitation applies even if the spouses work at different work sites located more than 75 miles apart, or are employed by different divisions of the same operating company. 29 C.F.R. 825.202(b).

<sup>49</sup>29 C.F.R. 825.202(c). For example, if each spouse took 6 weeks of leave to care for a healthy, newborn child, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition. 29 C.F.R. 825.202(c).

a health care provider for a chronic condition which, if left untreated, would result in an absence from work of more than three calendar days.<sup>50</sup> Examples of serious health conditions may include heart attacks, heart conditions requiring heart bypass or valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, stress, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job, ongoing pregnancy, severe morning sickness, the need for prenatal care, child birth, and recovery from child birth.

The definition of “serious health condition” does not include (1) conditions that do not involve in-patient care and continuing treatment; (2) illnesses such as the common cold, flu, ear aches, upset stomach, minor ulcers, headaches other than migraines, routine dental or orthodontia problems, or periodontal disease unless complications develop; and (3) cosmetic treatments such as acne or plastic surgery, unless in-patient care is required or complications develop. Treatments for allergies or stress, or for substance abuse are serious health conditions if they otherwise meet the definition of a serious health condition.

#### Procedure

The leave required by the FMLA is unpaid leave. However, if the employer provides paid leave for fewer than 12 weeks, it must still provide unpaid leave for the balance of the 12 weeks. In certain circumstances, an eligible employee may elect, or an employer may require the employee, to substitute and use any accrued paid vacation leave, personal leave, or family leave during the 12 week period.

Employees on leave under the FMLA are entitled to be restored to the position of employment they held when they went on leave, or to be restored to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. Employees are not required to requalify for their benefits upon their return to work.

When returning from FMLA qualifying leave, an employee is entitled to be returned to the same position that he held prior to taking leave, or an equivalent position with equivalent benefits, pay and other terms and conditions of employment. An employee’s reinstatement rights continue regardless of whether the employee has been replaced or his position has been restructured to accommodate the employee’s absence. However, if the employee is unable to perform the essential functions of the position because of a physical or mental condition, the employee has no right to restoration to another position under the FMLA. Taking FMLA leave does not entitle the employee to any greater rights of employment than those to which he or she would have been entitled had he not taken FMLA leave.

Employers are responsible for designating leave taken as FMLA leave and notifying an employee that his leave has been designated as such.<sup>51</sup> An employee’s request for FMLA leave

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<sup>50</sup>29 C.F.R. 825.114.

<sup>51</sup>29 C.F.R. 825.208(a).

must explain the reasons for the needed leave in sufficient detail so as to allow the employer to determine that the leave qualifies under the Act. If the employee fails to explain why the unpaid leave is requested, the leave may be denied.<sup>52</sup> In cases involving the serious health condition of an employee, spouse, parent, or child, the employer may require medical certification of the condition.

Under the FMLA, an employer must notify an employee of the designation of an absence as FMLA leave within two (2) business days of an employer's learning that leave is being taken for an FMLA purpose. If the employer fails to designate the leave and/or give notice of the designation, the employer may not do so retroactively but only prospectively. It is also important to note that the employee will enjoy FMLA protection for the absence and only post-notification leave will be counted toward the employee's 12-week entitlement<sup>53</sup>.

There are two exceptions to the general rule that employers cannot designate leave as FMLA leave after an employee has returned to work. Employers can designate leave as FMLA leave after an employee has returned if the employer did not learn of the reason for the absence until the employee's return or the employer made a preliminary designation (and notified the employee) pending receipt of medical certification or requisite information.<sup>54</sup>

Employees can assert FMLA protection for an absence by notifying an employer within two (2) business days of their return that the absence was for an FMLA reason. If an employee's notice is later, FMLA protection cannot be asserted.<sup>55</sup> If and when an employee provides notice that leave is needed, the employer must notify the employee of his specific rights under the Act.

Employers are prohibited from interfering with, restraining, or denying the exercise of or the attempted exercise of any right provided in the FMLA. They are also prohibited from discharging or discriminating against any person proposing any practice made unlawful by the FMLA. Employers are required to make, keep, and preserve records regarding compliance with the Act.

### Liability

The Secretary of Labor may bring an action in court for damages. Employees may also bring an action in federal or state court against an employer for violation of the FMLA. The employee may be awarded reasonable attorneys fees, reasonable experts fees, and other costs. Employers who violate the FMLA will be liable to any eligible employee for damages equal to the amount

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<sup>52</sup>The employee does not have to mention the FMLA but must provide sufficient detail for the employer to determine whether it is a FMLA qualifying event. *Manual v. Westlake Polymer*, 66 F.3d 758 (5<sup>th</sup> Cir.1995).

<sup>53</sup>29 C.F.R. 825.208(b)(1).

<sup>54</sup>29 C.F.R. 825.208(e).

<sup>55</sup>29 C.F.R. 825.208(e)(1).

of any wages, salary, employment benefits, or other compensation denied or lost because of a violation of the Act, including liquidated damages and interest. The employee may also be awarded appropriate equitable relief, including employment, reinstatement, and promotion.

## Health Insurance Portability and Accountability Act of 1996

### Coverage

Effective for plan years beginning on or after July 1, 1997, the Health Insurance Portability and Accountability Act of 1996 (the “Act”)<sup>56</sup> limits the extent to which employer-sponsored group health plans and issuers of group health insurance may exclude individuals based on preexisting conditions. In addition, health insurance issuers offering coverage must accept any “eligible individual” (Individuals with at least 18 months of creditable coverage without a break in coverage of 63 days or more) in the state who apply for coverage without imposing a preexisting condition exclusion. Certain non-federal governmental plans to the extent self-funded may elect to be exempted from some or all of the coverage requirements; however, such entities may not elect out of the certification and disclosure requirements. Plans making the election must notify plan participants of the election at the time of enrollment and on an annual basis.<sup>57</sup>

The Act does not require health insurance issuers to make group health insurance available to large employers (those with 51 or more employees). Instead, it assumes that such coverage is available. Every health insurance issuer that offers group health insurance to small employers (defined as employers with 2-50 employees) in a state must accept every small employer in the state that applies for coverage, as well as each eligible individual who applies for enrollment during the period in which the individual first becomes eligible to enroll under the terms of the small employer’s plan.

### General Rules

#### *Preexisting Conditions*

An employer-sponsored group health plan and a health insurance issuer offering group health insurance coverage can exclude participants and beneficiaries from coverage because of a preexisting condition only if the following statements regarding the exclusion are true:

1. The employee has a “genuine medical condition.” A genuine medical condition is defined as a condition for which medical advice, diagnosis, care, or treatment was recommended or received in the six (6) months prior to the time the individual enrolled in the plan or began a waiting period to enroll.<sup>58</sup> The cause of the

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<sup>56</sup>Pub. L. 104-191.

<sup>57</sup>45 C.F.R. § 146.180

<sup>58</sup>26 C.F.R. §54.99801-3.

condition is irrelevant, and genetic information will not itself be considered a medical condition unless it is diagnosed to be one.

2. The exclusionary period does not last for longer than twelve (12) months.<sup>59</sup> In the case of a late enrollee (one who joins a plan other than during his first eligibility period or during a “special enrollment period”), the exclusionary period can last for eighteen (18) months.
3. The exclusionary period is reduced by the length of time immediately preceding the individual’s enrollment date that he was covered under another group health plan, health insurance policy (group or otherwise) providing for medical care, Medicare, Medicaid, military-sponsored health care, or other specified health program.<sup>60</sup> The coverage period which must be credited extends from the enrollment date back to the date the employee first had a break in coverage lasting at least 63 days (not counting any waiting period for coverage). Thus, an individual who was continuously covered under one employer’s group health plan for 12 months or longer and who moved immediately to another employer’s group health plan could not be excluded on the basis of a preexisting condition. Under a special transition rule, certificates are not required for coverage prior to July 1, 1996. However, an individual has the right to demonstrate such prior coverage through the presentation of documents or other means.

#### *Prohibition on Discrimination Based on Health Status*

Group health plans and issuers may not discriminate against individuals by limiting eligibility or continued eligibility on any of the following health factors:

- (a) Health status;
- (b) Medical condition (mental or physical);
- (c) Claims experience;
- (d) Receipt of health care;
- (e) Medical history;
- (f) Genetic information;
- (g) Evidence of insurability (including conditions arising out of acts of domestic violence); or

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<sup>59</sup>45 C.F.R. §146.111.

<sup>60</sup>45 C.F.R. §146.113.

(h) Disability.<sup>61</sup>

Despite the foregoing, a group health plan or issuer is not required to provide any particular benefits beyond those provided for in the plan, and a group plan is free to limit the level and nature of benefits or coverage for all similarly-situated individuals who are enrolled in the plan. Moreover, no violation will occur if the generally applicable terms of a plan have a disparate impact on certain individuals, as long as the plan is not knowingly designed to discriminate against individuals.

Group health plans and issuers may not require an individual, as a condition of enrollment or continued enrollment, to pay a premium that is greater than the premiums charged similarly-situated individuals on the basis of any health-status factors pertaining to that individual.

#### Exceptions

A group health plan and a health insurance issuer offering group health coverage may not impose any preexisting condition exclusion in connection with a pregnancy.<sup>62</sup> In addition, no preexisting condition exclusion may be imposed on newborns, adopted children or children placed for adoption who, within 30 days of birth, adoption or placement, were covered by health insurance, unless they subsequently incurred a break in coverage lasting at least 63 days.<sup>63</sup>

#### Certificates and Disclosures of Coverage

##### *Certifications*

At the time a participant or dependent either ceases to be covered under a plan or obtains Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) continuation coverage, a group health plan or health insurance issuer is required to provide the individual with a written certificate of:

- (1) The creditable coverage period;
- (2) Continuation coverage, if any, under COBRA; and
- (3) The waiting period, if any, imposed under the plan for coverage.<sup>64</sup>

Group health plans and issuers may provide the certificate at a time, to the extent practicable, that is consistent with the notices required under COBRA. The certificate must also be provided

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<sup>61</sup>45 C.F.R. §146.121(a).

<sup>62</sup>45 C.F.R. §146.111(b)(4).

<sup>63</sup>45 C.F.R. §146.111(b)(2).

<sup>64</sup>45 C.F.R. §146.125, 26 C.F.R. §54.9806-1, 29 C.F.R. §146.125.

when an individual's COBRA continuation coverage expires, and again at the request of or on behalf of a former enrollee if the request is made within 24 months of the expiration of the group health coverage or, if applicable, the COBRA continuation coverage. No certificate was required to be provided before June 1, 1997, and with respect to events occurring between July 1, 1996, and October 1, 1996, no certificate was required unless one was requested in writing.<sup>65</sup>

### *Disclosure Requirements*

Modification to a group health plan involving a material reduction in covered services or benefits must be explained to participants and beneficiaries in a summary description. The summary must be provided no later than 60 days after the date of the adoption of the modification or, alternatively, as part of a summary provided in regular intervals of 90 days. Group health plans must also now disclose in the summary plan description whether an insurance company is responsible for financing or administering the plan (including handling the payment of claims) and, if so, the insurance company's name and address.<sup>66</sup>

### Special Enrollment Periods

Employees (and/or their dependents) who elect to receive health insurance coverage through a plan or policy other than their employer's plan (for example, under a spouse's plan) must be permitted to enroll later in the employer's plan if they meet the following conditions:

1. The employee (and/or dependents) must otherwise meet the eligibility requirements (including any valid preexisting condition exclusions) for enrollment;
2. The employee's (or dependent's) prior coverage must have been under a COBRA continuation provision that was exhausted, or under non-COBRA coverage that was terminated as a result of a loss of eligibility (as, for example, when a spouse loses his or her job) or the discontinuation of employer contributions;
3. If the group plan or issuer so requires and notifies the employee (or dependent), the employee (or dependent) must have stated in writing at the time he originally declined the employer's coverage that the availability of the alternate coverage was the reason for not enrolling under the employer's plan; and
4. The employee (or dependent) must request to enroll in the employer's plan within 30 days after the date the COBRA or other coverage expires or terminates.<sup>67</sup>

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<sup>65</sup>45 C.F.R. §146.120.

<sup>66</sup>45 C.F.R. §146.120.

<sup>67</sup>45 C.F.R. §146.122.

A special enrollment period is also available for individuals who become dependents of a covered or otherwise eligible individual if the group plan provides dependent coverage. During the special enrollment period, persons who become dependents through marriage, birth, adoption, or placement for adoption must have at least 30 days from becoming a dependent to enroll.

### Penalties

If a plan violates the portability portion of the Act, an individual can bring a private cause of action under ERISA against an employer-sponsor of a group health plan or a health insurance issuer for equitable (i.e., nonmonetary) relief to enforce his rights under the Act.<sup>68</sup>

Failure by a group health plan to satisfy the portability and access requirements can result in the imposition of a penalty tax on the employer sponsor of the plan equal to \$100 per day for each individual with respect to whom the requirements are not met.<sup>69</sup> The maximum tax for unintentional failures is the lesser of 10% of the employer's cost for health insurance for the year or \$500,000.

Generally, no tax will be imposed if the employer did not know of and, exercising reasonable diligence, could not have known of a violation.<sup>70</sup> Nor will any tax be imposed if the violation was unintentional and corrected within 30 days after the date of discovery of the violation. The Internal Revenue Service (IRS) may waive part or all of the tax in any case where the violation was unintentional and not due to willful neglect. For small employers, no tax will be imposed if the violation is solely as a result of coverage provided to employees through an insurance or health maintenance organization (HMO) contract.

## Title VI

### Coverage

Title VI of the 1964 Civil Rights Act covers any program or activity which receives federal financial assistance<sup>71</sup> for the purpose of providing employment.<sup>72</sup> Agencies that administer the various assistance programs require recipients of federal assistance to adopt affirmative action plans to comply with Title VI.

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<sup>68</sup>45 C.F.R. §146.180(I)(a).

<sup>69</sup>45 C.F.R. §146.180(iv)(B)(7).

<sup>70</sup>45 C.F.R. §146.180(iii).

<sup>71</sup>42 U.S.C. § 2000d.

<sup>72</sup>42 U.S.C. § 2000d-3.

## Prohibited Conduct

Title VI prohibits discrimination on the basis of race, color or national origin.<sup>73</sup> Discrimination on the basis of sex and religion is not expressly prohibited, but sex discrimination is prohibited under the terms of many federal assistance programs to which Title VI applies.

## Procedure

The federal agency which administers a particular financial assistance program can terminate or refuse to grant that assistance to any recipient who is found to be in violation of Title VI. Before taking such action, however, the agency must notify the recipient of the failure to comply and must attempt to gain voluntary compliance.<sup>74</sup> Any recipient of federal assistance who has been denied assistance because of alleged noncompliance with Title VI is entitled to judicial review of the adverse agency ruling.<sup>75</sup> Furthermore, an aggrieved party may sue to obtain relief from discriminatory practices prohibited by Title VI.<sup>76</sup>

## Liability

Termination of federal financial assistance is the main penalty for noncompliance with Title VI.<sup>77</sup> In addition, a noncomplying recipient may be subject to injunctive relief requiring compliance<sup>78</sup> and may be required to pay attorneys' fees to the prevailing party in a suit to enforce Title VI.<sup>79</sup>

## Title IX

### Coverage

Title IX of the Education Amendments of 1972 applies to any education program or activity that receives federal financial assistance and prohibits discrimination on the basis of sex.<sup>80</sup> Title IX

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<sup>73</sup>42 U.S.C. § 2000d.

<sup>74</sup>42 U.S.C. § 2000d-1.

<sup>75</sup>42 U.S.C. § 2000d-2.

<sup>76</sup>*Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (1967), *cert. denied*, 388 U.S. 911 (1967).

<sup>77</sup>42 U.S.C. § 2000d-1.

<sup>78</sup>*Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5<sup>th</sup> Cir. 1967).

<sup>79</sup>42 U.S.C. § 1988.

<sup>80</sup>20 U.S.C. § 1681(a).

regulates the entire operations of a municipality even if only one program is receiving federal assistance.<sup>81</sup> Title IX does not apply to educational institutions controlled by religious organizations if application of the Act “would not be consistent with the religious tenets of such organization”;<sup>82</sup> educational institutions whose primary purpose is the training of individuals for military service or the Merchant Marines;<sup>83</sup> and beauty pageant scholarships for higher education.<sup>84</sup> Also excluded are social sororities and fraternities, the YMCA, YWCA, Girl and Boy Scouts, and other voluntary youth service organizations traditionally limited to persons of one sex and to persons under 19 years of age;<sup>85</sup> boy and girl conferences;<sup>86</sup> and father-son or mother-daughter activities.<sup>87</sup>

### Prohibited Conduct

Title IX applies to employees and students and therefore prohibits discrimination against any student<sup>88</sup> or employee<sup>89</sup> on the basis of sex. This ban on employment discrimination applies to the operations of an entire municipality even if only one program uses federal funds.<sup>90</sup>

### Procedure

The procedure for enforcing Title IX is identical to the Title VI enforcement procedure.<sup>91</sup>

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<sup>81</sup>20 U.S.C. § 1687.

<sup>82</sup>20 U.S.C. § 1681(a)(3).

<sup>83</sup>20 U.S.C. § 1681(a)(4).

<sup>84</sup>20 U.S.C. § 1681(a)(9).

<sup>85</sup>20 U.S.C. § 1681(a)(6).

<sup>86</sup>20 U.S.C. § 1681(a)(8).

<sup>87</sup>20 U.S.C. § 1681(a)(8).

<sup>88</sup>20 U.S.C. § 1681(a).

<sup>89</sup>*North Haven Board of Education v. Bell*, 456 U.S. 512 (1982).

<sup>90</sup>20 U.S.C. § 1687.

<sup>91</sup>*See* discussion of Title VI above. *See also* 20 U.S.C. §§ 1681, 1682.

## Liability Exposure

The potential liability under Title IX is identical to the potential liability under Title VI.<sup>92</sup>

### Age Discrimination in Employment Act

#### Coverage

The Age Discrimination in Employment Act (ADEA) applies to every municipality having twenty (20) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year.<sup>93</sup> A charge under the ADEA can be filed by any “individual employed by an employer” or by an applicant for employment who alleges discrimination in hiring.

#### Prohibited Conduct

Under the ADEA, it is unlawful for a municipality to discriminate against employees or job applicants forty (40) or more years old on account of age.<sup>94</sup> Prohibited conduct includes discrimination on the basis of age by refusing to hire, discharging, disciplining, denying employment opportunities, involuntarily retiring, or otherwise discriminating against individuals in the protected age group with respect to compensation, terms, conditions, or privileges of employment.<sup>95</sup> The ADEA also forbids retaliation against an employee or applicant because the individual has opposed any practice prohibited by the Act, has filed a charge, or has participated in any way in a proceeding under the Act.<sup>96</sup> Finally, the Act prohibits any advertisement relating to employment which indicates any preference, limitation, specification, or discrimination based on age.<sup>97</sup>

Four major exemptions from the ADEA’s prohibition exist: (1) where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business; (2) where the differentiation is based on reasonable factors other than age; (3) where a bona fide seniority system or a bona fide benefit plan which is not a subterfuge to evade the Act

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<sup>92</sup>See discussion of Title VI above. See also 20 U.S.C. § 1681; 42 U.S.C. § 1988; *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

<sup>93</sup>29 U.S.C. § 630(b).

<sup>94</sup>29 U.S.C. § 623 (a); 29 U.S.C. § 631(a).

<sup>95</sup>29 U.S.C. § 623 (a).

<sup>96</sup>29 U.S.C. § 623 (d).

<sup>97</sup>29 U.S.C. § 623 (e).

is being observed; or (4) where an employee is being discharged or disciplined for good cause.<sup>98</sup> An employer who raises the bona fide occupational qualification defense to an ADEA charge must, at a minimum, show that there is a reasonable basis for believing that all or substantially all persons within the affected age group would be unable to perform the duties of the job safely and efficiently.<sup>99</sup>

A plaintiff who alleges that he was discharged because of age discrimination must prove that: (1) he belongs to the protected group (at least 40 years old); (2) he was discharged, or some other adverse employment action was taken; (3) his replacement was either a person outside the protected group, or some other discriminatory action was taken; and (4) he was qualified for the position he was seeking or which he held.<sup>100</sup> This same burden of proof applies to allegations of age discrimination in other areas such as hiring and promotion. However, the factors that a plaintiff must prove may vary on a case-by-case basis.<sup>101</sup> After the plaintiff has met this burden, the employer must show a legitimate, non-discriminatory reason for its action.<sup>102</sup> The plaintiff may then show that the employer's stated reasons is a pretext for the alleged discrimination.<sup>103</sup>

### Procedure

The Equal Employment Opportunity Commission (EEOC) investigates age discrimination claims upon the filing of a charge within 180 days of the alleged unlawful act of discrimination.<sup>104</sup> An investigation can, however, be initiated by any information available to the EEOC such as news stories and advertisements. The EEOC can terminate its investigation of an age discrimination charge at any time. The EEOC's primary purpose in such an investigation is to attempt to resolve the differences between the charging party and the party charged with discrimination.

A charging party's right to file suit against the municipality is subject to two time limitations. First, the charging party must give the EEOC at least 60 days to attempt to settle the charge.<sup>105</sup>

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<sup>98</sup>29 U.S.C. § 623 (f).

<sup>99</sup>*Western Airlines, Inc. v. Criswell*, 472 U.S. 400, 105 S.Ct. 2743, 86 L.Ed. 2d 321 (1985); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5<sup>th</sup> Cir. 1971).

<sup>100</sup>*Meinecke v. H & R Block of Houston*, 66 F.3d 77 (5<sup>th</sup> Cir. 1995).

<sup>101</sup>*Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176 (6<sup>th</sup> Cir. 1983).

<sup>102</sup>*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Mooney v. Aramco Services*, 54 F.3d 1207 (5<sup>th</sup> Cir. 1995).

<sup>103</sup>*Meinecke v. H & R Block of Houston*, 66 F.3d 77 (5<sup>th</sup> Cir. 1995).

<sup>104</sup>29 U.S.C. § 626 (d); see *Coke v. General Adjustment Bureau*, 640 F.2d 584 (5<sup>th</sup> Cir. 1981).

<sup>105</sup>29 U.S.C. § 626 (d).

An employee may then file suit at any time beginning at the expiration of the 60 days. If the claimant awaits the outcome of the EEOC investigation, he must file suit within 90 days of receiving his notice of the right to sue.<sup>106</sup> If the EEOC brings suit on behalf of the charging party, that party's right to file suit is terminated.<sup>107</sup>

### Liability Exposure

A municipality that loses an ADEA suit may be liable for the following: back pay and other benefits lost by an employee or applicant; costs and attorneys fees; and affirmative action measures such as hiring an applicant denied employment, reinstating an employee unlawfully terminated, or promoting an employee unlawfully denied promotion.<sup>108</sup> All of the above costs are multiplied if the plaintiff induces other persons who have suffered discrimination to join in the suit.<sup>109</sup>

A municipality may also be liable for front pay. Although reinstatement is the preferred remedy, front pay may be awarded where the plaintiff shows that reinstatement is not feasible.<sup>110</sup> Courts will reduce an award of front pay by the amount the plaintiff will or should earn in the future by seeking out and taking advantage of opportunities reasonably available to him.<sup>111</sup>

### Fair Labor Standards Act

On February 19, 1985, the United States Supreme Court held that state and local governments were subject to the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA).<sup>112</sup> As a result of this decision, many state and local governmental employers and employee organizations identified several areas in which they believed they would be adversely affected by immediate application of the FLSA. In response to these problems, the Fair Labor Standards Amendments of 1985 were enacted into law. These amendments changed certain provisions of the FLSA as they relate to employees of state and local governments. Subsequently, regulations were issued which further clarified the responsibilities to governmental employees under the FLSA.

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<sup>106</sup>29 U.S.C. § 626 (e).

<sup>107</sup>29 U.S.C. § 626 (c)(1).

<sup>108</sup>29 U.S.C. §626 (b).

<sup>109</sup>29 U.S.C. § 216 (b); *Woods v. New York Life Ins. Co.*, 686 F.2d 578 (7<sup>th</sup> Cir. 1982).

<sup>110</sup>*Walker v. Lone Star Gas Co.*, 952 F.2d 119 (5<sup>th</sup> Cir. 1992).

<sup>111</sup>*Burns v. Texas City Refining, Inc.*, 890 F.2d 747 (5<sup>th</sup> Cir. 1989); *Hansard v. Pepsi Cola Metropolitan Bottling Co. Inc.*, 865 F.2d 1461 (5<sup>th</sup> Cir. 1989).

<sup>112</sup>*Garcia v. San Antonio Metropolitan Transit Authority*, 471 U.S. 1049, 83 L.Ed.2d 1016 (1985).

## Coverage

### *Covered Employees*

The FLSA applies to employees of municipalities,<sup>113</sup> but the FLSA definition of “employee” does not include the following:

- (a) Independent contractors;
- (b) Volunteers;
- (c) Apprentices;
- (d) Elected officials and their personal staff, policy-making appointees and advisors to elected officials;
- (e) Employees of legislative bodies; and
- (f) Prisoners

Individuals who fall within one of these categories are not covered by the FLSA.

### *Independent Contractors*

An independent contractor generally is an individual who is engaged in a business of his own. A determination of the relationship depends upon the “economic reality” of the situation.<sup>114</sup> Although no single factor is controlling, the factors to be considered include the following:

- (1) The extent to which the services in question are an integral part of the employer’s business;
- (2) The permanency of the relationship;
- (3) The amount of the alleged contractor’s investment in facilities and equipment;
- (4) The nature and degree of control by the principal;
- (5) The alleged contractor’s opportunities for profit and loss; and
- (6) The amount of initiative, judgment, or foresight in open market competition with

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<sup>113</sup>29 U.S.C § 203(e)(1)(2); 29 U.S.C. § 206(a)(d)(1).

<sup>114</sup>*Goldberg v. Whitaker House Cooperative*, 366 U.S. 28 (1961).

others that is required for the success of the claimed independent enterprise.<sup>115</sup>

It is these factors, rather than labeling an individual an independent contractor, that is determinative of the actual relationship between the individual and the employer.<sup>116</sup>

### *Volunteers*

Individuals who donate their services to a public agency for civic, charitable, or humanitarian reasons without contemplation of pay are considered volunteers, not employees of the public agency.<sup>117</sup> Volunteers are not covered by the minimum wage, overtime, or record keeping requirements of the FLSA.<sup>118</sup> Examples of services which might be performed by volunteers include the following:

- (1) Assisting in a sheltered workshop;
- (2) Providing personal services to the sick or elderly in a hospital or nursing home;
- (3) Assisting in a school library or cafeteria;
- (4) Driving a school bus to carry a football team or band on a trip;
- (5) Working as a volunteer fire fighter or auxiliary police officer;
- (6) Working with retarded or handicapped children or disadvantaged youth;
- (7) Helping in youth programs as a camp counselor; or
- (8) Soliciting contributions or participating in civic or charitable benefit programs.<sup>119</sup>

An individual is considered to be an employee, not a volunteer, when performing the same type of services which the individual is employed to perform for the same public agency.<sup>120</sup> Whether two agencies constitute the same public agency will be determined on a case-by-case basis. However, the Labor Department has stated that one factor to be considered is whether the two

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<sup>115</sup>U.S. Dept. of Labor, W.H. Publication 1459, "State and Local Government Employees Under the Fair Labor Standards Act" at 4 (May 1985).

<sup>116</sup>*Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947).

<sup>117</sup>29 C.F.R. § 553.100.

<sup>118</sup>29 C.F.R. § 553.101(a).

<sup>119</sup>29 C.F.R. § 553.104.

<sup>120</sup>29 U.S.C. § 203(e)(4)(A)(ii).

agencies are treated separately for reporting purposes in the *Census of Governments* issued by the Bureau of the Census.<sup>121</sup> The phrase “same type of services” means similar or identical services. The more dissimilar the volunteer service activities are compared to those performed during the employee’s paid employment, the clearer it is that the individual is acting as a volunteer.<sup>122</sup>

A volunteer may be paid expenses, reasonable benefits, and/or a nominal fee for his service.<sup>123</sup> Expenses include such things as reimbursement for cleaning or for wear and tear on personal clothing worn while performing volunteer service. Also reimbursable are expenses for transportation incurred incidental to providing the volunteer services.<sup>124</sup> Similarly, volunteer status is not lost because of reimbursement for tuition, materials, transportation, and meal costs for a volunteer to attend classes intended to teach them to perform efficiently the services they will provide as volunteers.<sup>125</sup>

Reasonable benefits include inclusion in group insurance programs maintained by the public agency for its employees who perform the same services as the volunteers.<sup>126</sup> Finally, a volunteer can receive a nominal fee, but this cannot be a substitute for compensation and must not be tied to productivity. Factors the Labor Department will consider in determining whether an amount is nominal are the following:

- (1) The distance traveled and time and effort expended by the volunteer;
- (2) Whether the volunteer has agreed to be available at all times or only at certain times; and
- (3) Whether the volunteer provides services as needed or throughout the year.<sup>127</sup>

#### *Apprentices, Trainees, Students, Beginners, and Learners*

Whether a trainee, beginner, apprentice, student, or learner is an employee depends on all the circumstances surrounding his activities on the premises of the employer. Such individuals who are undergoing training merely to learn the duties of a job and to become qualified for

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<sup>121</sup>29 C.F.R. § 553.102(b).

<sup>122</sup>29 C.F.R. § 553.103(a).

<sup>123</sup>29 U.S.C. § 203(e)(4)(A)(I).

<sup>124</sup>29 C.F.R. § 553.106(b).

<sup>125</sup>29 C.F.R. § 553.106(c).

<sup>126</sup>29 C.F.R. § 553.106(d).

<sup>127</sup>29 C.F.R. § 553.106(e).

employment are not employees if they receive no pay for their training time.<sup>128</sup>

In determining whether an individual is an employee, the courts will consider the following:

- (1) The training, even though it includes the actual operation of the facilities of the employer, is similar to training that would be given in a vocational school;
- (2) The training is for the individual's benefit;
- (3) The individual does not displace regular employees, but works under their close supervision;
- (4) The employer that provides the training derives no immediate advantage from the individual's activities, and occasionally the employer's operations are actually impeded;
- (5) The individual is not necessarily entitled to a job at the conclusion of the training period; and
- (6) The employer and the individual understand that the individual is not entitled to wages for the time spent training.<sup>129</sup>

Not all six criteria have to apply if all the facts surrounding the trainee's activities demonstrate that the trainee does nothing that immediately benefits the employer.<sup>130</sup>

#### *Elected Officials and Their Personal Staff, Appointees, and Legal Advisors*

Excluded from FLSA coverage are elected officials and their personal staff members, persons appointed by elected officials to serve in policy making positions, and certain advisors to the elected officials.<sup>131</sup> However, these individuals are excluded from coverage only if they are not subject to the civil service laws of the employing entity.<sup>132</sup> Factors used to determine whether an employee is subject to the civil service laws include the following:

- (1) Whether the position is included in a table of organization for a branch of government or a committee or commission established by a branch of government;

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<sup>128</sup>*Waring v. Portland Terminal Co.*, 330 U.S. 148 (1947); 29 U.S.C. § 214.

<sup>129</sup>*Wage and Hour Field Operations Handbook* § 10b11.

<sup>130</sup>*Martin v. Parker Fire Protection Dist.*, 1993 U.S. App. Lexis 12656 (10<sup>th</sup> Cir. 1993).

<sup>131</sup>29 U.S.C. § 203(e)(2)(C).

<sup>132</sup>29 U.S.C. § 203(e)(2)(C)(i).

- (2) Whether the individual serves at the pleasure of the elected official; and
- (3) Whether the person's compensation depends upon a specific appropriation or is paid out of an office expense allowance provided to the elected official.<sup>133</sup>

Members of the elected official's personal staff include only persons who are under the direct supervision of, and have regular contact with, the elected official.<sup>134</sup> To be excluded as a legal advisor, an individual must serve on the elected official's staff and advise him on constitutional or legal matters.<sup>135</sup>

#### *Employees of Legislative Bodies*

Individuals employed in the legislative branch of state or local government and who are not subject to the civil service laws of their employing agencies are not covered by the FLSA.<sup>136</sup> However, this exclusion does not apply to employees of state or local legislative libraries or to employees of school boards, other than elected officials and their appointees.<sup>137</sup>

#### *Prisoners*

The FLSA does not apply to a prison inmate if, while serving a prison sentence, he is required to work by or does work for the prison within the confines of the institution on prison farms, road gangs, or other areas directly associated with the incarceration program.<sup>138</sup> Where inmates are contracted out by an institution to a private company or individual, an employer-employee relationship may be created between the company or individual and the prisoners,<sup>139</sup> regardless of whether the work is performed within the confines of the institution or elsewhere.<sup>140</sup> The FLSA applies where a prisoner's work for a private employer in the local or national economy would tend to undermine the FLSA wage scale.<sup>141</sup>

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<sup>133</sup>29 C.F.R. § 553.11(c).

<sup>134</sup>29 C.F.R. § 553.11(b).

<sup>135</sup>29 C.F.R. § 553.10(d).

<sup>136</sup>29 U.S.C. § 203(e)(2)(C).

<sup>137</sup>29 C.F.R. § 553.12(b).

<sup>138</sup>*Harkin v. State Use Industries*, 990 F.2d 131 (4<sup>th</sup> Cir. 1993); *Alexander v. Sara, Inc.*, 721 F.2d 149 (5<sup>th</sup> Cir. 1983).

<sup>139</sup>*Watson v. Graves*, 909 F.2d 1549 (5<sup>th</sup> Cir. 1990).

<sup>140</sup>*Wage and Hour Field Operations Handbook* § 10b29(b).

<sup>141</sup>*Dannelsgold v. Hamsrath*, 82 F.3d 37 (2<sup>nd</sup> Cir. 1996).

### *Joint Employment*

In some situations, an employee can be considered to be working for two or more employers at the same time. When such a “joint employment” relationship exists, the hours worked and compensation received by the employee from each employer must be totaled to determine compliance with the FLSA’s minimum wage and overtime requirements.<sup>142</sup> A joint employment relationship generally will be considered to exist under one of the following conditions:

- (a) Where there is an arrangement between the employers to share the employee’s services; *or*
- (b) Where one employer is acting directly or indirectly in the interest of the other employer; *or*
- (c) Where the employers share the control of the employee because one employer controls, is controlled by, or shares common control with the other employer.<sup>143</sup>

The 1985 Amendments to the FLSA create three exceptions to the joint employment rule that apply to municipal employees. These exceptions pertain to the following:

- (a) Occasional or sporadic employment;
- (b) Special detail work for public safety employees; and
- (c) Work performed for more than one jurisdiction under a mutual aid agreement.

### *Occasional and Sporadic Employment*

Generally, the hours worked by an employee for the employing jurisdiction in addition to his regular hours must be added to the employee’s regular hours in determining overtime compensation. An exception to this rule applies to state or local government employees who, solely at their option, work occasionally or sporadically on a part-time basis for the same public agency in a different capacity from their regular employment. In such instances, the hours worked in the different jobs do not have to be combined for purposes of determining overtime liability under the FLSA.<sup>144</sup>

An activity may be occasional or sporadic even if it is recurring. For example, taking tickets or providing security for special events such as concerts and sports events may be considered occasional or sporadic even though the event recurs seasonally. Conversely, additional work

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<sup>142</sup>29 C.F.R. § 791.2(a).

<sup>143</sup>29 C.F.R. § 791.2(b).

<sup>144</sup>29 C.F.R. § 553.30(a).

performed *regularly* for the same agency is not considered intermittent or irregular employment and therefore, the hours worked must not be combined in computing any overtime compensation due. To illustrate, the Labor Department uses the example of a parks department clerk who also regularly works additional hours on a part-time basis every week at a public park food and beverage sales center operated by the agency.<sup>145</sup>

To qualify for this exemption, the employee's decision to work in a different capacity must be made freely and without coercion by the employer. The employer may *suggest* that the employee undertake another kind of work when the need for assistance arises, but the employee must be free to refuse to perform the work without penalty or justification.<sup>146</sup>

An employee is considered to be working in a different capacity if the job does not fall within the same general occupational category as the employee's regular job. Factors to be considered in making this determination include the education, experience, duties, skills, and knowledge required by the jobs.<sup>147</sup>

### *Special Details*

Another exception to the joint employment rule provided by the 1985 Amendment applies to a fire protection or law enforcement employee's hours spent working on a special detail for a separate or independent employer in fire protection, law enforcement, or related activities. For purposes of this exception, security personnel in correctional institutions are considered to be law enforcement employees. The hours worked on such a special detail do not have to be counted by the employing jurisdiction in figuring overtime compensation if the special detail is worked solely at the employee's option. This exception will not be destroyed even if the primary employer requires the second employer to hire its employees for special details, facilitates the hiring of its employees, or affects the conditions of employment of the special detail.<sup>148</sup>

### *Mutual Aid Agreements*

Finally, the 1985 Amendments allow state and local government employees to volunteer to perform services for other state or local government agencies, even if the primary employer has a mutual aid agreement with the agency for which the volunteer work is performed.<sup>149</sup> For example, where Town A and Town B have entered into a mutual aid agreement related to fire protection, a firefighter employed by Town A who also is a volunteer firefighter for Town B will

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<sup>145</sup>29 C.F.R. § 553.30(b)(3).

<sup>146</sup>29 C.F.R. § 553.30(2).

<sup>147</sup>29 C.F.R. § 553.30(c).

<sup>148</sup>29 U.S.C. § 207(p)(1).

<sup>149</sup>29 U.S.C. § 203(e)(4)(B).

not have his hours of volunteer service for Town B counted as part of his hours of employment with Town A. The mere fact that the service volunteered to Town B may, in some instances, involve work in Town A's geographic jurisdiction does not require the volunteer's hours to be counted as hours of employment with Town A.<sup>150</sup>

## Exemptions

### *Overview*

The FLSA contains certain exemptions which make its standards inapplicable to particular groups of employees. Generally, these exemptions can be classified into three categories: (1) those that completely suspend both the minimum wage and overtime provisions; (2) those that suspend only the overtime provisions; and (3) those that provide partial overtime exemptions limited to specific times of the year.

Courts have held that all exemptions from FLSA coverage must be strictly construed. Therefore, a municipality must show that an employee's activities fall squarely within the scope of a particular exemption before taking the benefit of the exemption.

Generally, FLSA exemptions are figured on a workweek basis. A workweek is defined as seven (7) consecutive 24 hour periods.<sup>151</sup> An employee can be considered exempt only if he meets the requirements of one (1) or more exemptions during an entire workweek.

It is possible for an employee to qualify for two or more exemptions in the same workweek. However, all of the requirements of each exemption must be satisfied and the employer can take advantage only of the *least restrictive* of the exemptions.

### *Exemptions Applicable to Municipalities*

The FLSA contains numerous exemptions, but the exemptions most likely to be used by municipalities are the exemptions for the following individuals:

- (a) Executive, administrative and professional employees,
- (b) Amusement or recreational establishment employees,
- (c) Employees who could be subject to § 204 of the Motor Carrier Act,
- (d) Hospital employees, and
- (e) Police and fire personnel.

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<sup>150</sup>29 U.S.C. § 553.105.

<sup>151</sup>29 C.F.R. § 778.105.

### *Executive, Administrative, and Professional Employees*

Executive, administrative and professional employees are exempt from the *minimum wage and overtime provisions* of the FLSA.<sup>152</sup> An employee meets one of these “white-collar” exemptions by meeting either a long test or a short test established by the Labor Department. However, the Labor Department recently issued a notice that it intends to revise these regulations in the near future.

An employee meets the long test for the *executive exemption* if the employee makes a salary of \$155 or more per week and meets all of the following requirements:

- (1) Spends fifty percent (50%) or more of his time managing an enterprise or department,
- (2) Customarily and regularly directs the work of two (2) or more employees besides himself,
- (3) Has the authority to hire, fire, promote, or make effective recommendations of such actions,
- (4) Customarily and regularly exercises discretionary powers, *and*
- (5) Does not spend more than twenty percent (20%) of his time on non-managerial activities.<sup>153</sup>

An employee meets the short test and is therefore exempt as an executive employee if he makes a salary of at least \$250 per week and meets the following requirements:

- (1) Spends fifty percent (50%) or more of his time managing an enterprise or department, *and*
- (2) Customarily and regularly directs the work of two (2) or more employees besides himself.<sup>154</sup>

An employee who makes a salary of \$155 or more a week and meets the following requirements can be exempt as an *administrative employee*:

- (1) Spends fifty percent (50%) or more of his time performing office or non-manual work related to management policies or general business operations,

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<sup>152</sup>29 U.S.C. § 213(a)(1).

<sup>153</sup>29 C.F.R. § 541.1(a)-(f).

<sup>154</sup>29 C.F.R. § 541.1(f).

- (2) Customarily and regularly exercises discretion and independent judgment,
- (3) Either regularly assists someone in an executive or administrative job, executes special assignments, or performs specialized or technical work requiring special training or knowledge, *and*
- (4) Does not spend more than twenty percent (20%) of his time performing non-exempt work.<sup>155</sup>

An employee meets the short test for administrative employees if he receives a salary of at least \$250 per week and meets the following requirements:

- (1) Spends fifty percent (50%) or more of his time performing office or non-manual work relating to management policies or general business operations, *and*
- (2) Customarily and regularly exercises discretion and independent judgment.<sup>156</sup>

An employee who makes a salary of at least \$170 per week qualifies for the *professional exemption* if the employee also spends at least eighty percent of his time performing one of the following duties:

- (1) Work requiring knowledge of an advanced type in a field of science or learning, *or*
- (2) Original and creative work in an artistic endeavor, *or*
- (3) Teaching, tutoring, instructing, or lecturing as a teacher certified or recognized as such in an educational institution by which he is employed.

Finally, the employee must consistently exercise discretion and judgment while performing work predominantly intellectual and varied in nature.<sup>157</sup>

The short test for a professional is met by an employee who makes a salary of at least \$250 per week, spends at least fifty percent (50%) of his time performing one of the duties outlined in the long test for professional employees and consistently exercises discretion and judgment with respect to scientific, specialized, or academic work. The exercise of discretion and judgment is not required with respect to artistic endeavors.<sup>158</sup>

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<sup>155</sup>29 C.F.R. § 541.2(a)-(e)(1).

<sup>156</sup>29 C.F.R. § 51.2(e)(2).

<sup>157</sup>29 C.F.R. § 541.3(a)-(e).

<sup>158</sup>29 C.F.R. § 541.3(e).

### *Amusement or Recreational Establishment Employees*

The FLSA provides a *minimum wage and overtime pay exemption* for any employee employed by an amusement or recreational establishment if:

- (1) The facility does not operate for more than seven (7) months in any calendar year,  
*or*
- (2) During the preceding calendar year, the facility's average receipts for any six (6) months of the year were not more than 33 $\frac{1}{3}$  percent of its average receipts for the other six (6) months of the year.<sup>159</sup>

This exemption has been held to apply to "establishments" such as golf courses,<sup>160</sup> swimming pools,<sup>161</sup> summer camps,<sup>162</sup> and parks.<sup>163</sup>

The term "establishment" means a distinct physical place of business.<sup>164</sup> Consequently, two or more physically separated portions of a business located on the same premises, and even under the same roof, may constitute more than one establishment.<sup>165</sup> In such circumstances, each unit must be evaluated to determine if its employees meet this exemption.

### *Interstate Motor Carrier Exemption*

The FLSA provides an exemption from the *overtime pay requirements* of the Act for employees subject to the provisions of the Motor Carrier Act.<sup>166</sup> The following three (3) requirements must be met to claim the benefit of this exemption:

- (1) Interstate commerce must be involved,

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<sup>159</sup>29 U.S.C. § 213(a)(3).

<sup>160</sup>Wage-Hour Opinion Letter No. 600 (May 25, 1967).

<sup>161</sup>Wage-Hour Opinion Letter No. 307 (Feb. 14, 1975); Wage-Hour Opinion Letter No. 288 (Sept. 10, 1974).

<sup>162</sup>Wage-Hour Opinion Letter No. 903 (June 10, 1968).

<sup>163</sup>29 U.S.C. § 553.32(e).

<sup>164</sup>29 C.F.R. § 779.303.

<sup>165</sup>29 C.F.R. § 779.305.

<sup>166</sup>29 U.S.C. § 213(b)(1)(Section 204 of the Motor Carrier Act was recodified at 49 U.S.C. § 3102).

- (2) The employer must be an operator subject to regulation by the Motor Carrier Act, *and*
- (3) The employee's activities must directly affect the safety of operation of motor vehicles.<sup>167</sup>

What constitutes transportation in interstate commerce sufficient to bring an employee within this exemption is determined by the definition of interstate commerce contained in the Motor Carrier Act. This definition is not identical to the less restrictive definition used in the FLSA. The Supreme Court has held that goods procured outside the state and brought to a warehouse, when the ultimate destination was the customer's place of business, retained their character as goods in interstate commerce.<sup>168</sup> Thus, employees who pick up such goods at a warehouse for delivery to the final destination may be exempt. Furthermore, the United States Supreme Court has held that the exemption may apply even though less than four percent (4%) of the employee's duties relate to interstate commerce.<sup>169</sup>

Types of employees whose activities have been held to directly affect the safety of operation of motor vehicles include drivers, driver's helpers, loaders, and mechanics.<sup>170</sup> Employees who have been held not to meet this definition include stenographers, clerks, foremen, warehousemen, superintendents, salesmen, and employees acting in an executive capacity.<sup>171</sup>

#### *Hospital Employees*

The FLSA recognizes the special needs of hospitals by allowing a hospital and its employees to utilize a fourteen-day period as the basis for overtime computation. This provision allows a hospital to enter into an arrangement with any of its employees, prior to performance of work, to establish a workweek of fourteen consecutive days instead of the regular workweek of seven consecutive days.<sup>172</sup>

A hospital employee who agrees to be paid on the basis of a fourteen day workweek must be paid overtime at not less than one and one-half times his regular rate (1) for any hours worked in excess of eight a day in the fourteen-day period, *and* (2) for any hours exceeding a total of eighty (80) in the fourteen-day period. Payments due for daily overtime may be credited against

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<sup>167</sup>29 C.F.R. § 782.2(a).

<sup>168</sup>*Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943).

<sup>169</sup>*Morris v. McComb*, 332 U.S. 422 (1947).

<sup>170</sup>29 C.F.R. §§ 553.32(f), 782.3-.6.

<sup>171</sup>29 C.F.R. § 782.2(f).

<sup>172</sup>29 C.F.R. § 207(j).

overtime due for hours over eighty (80) in the fourteen-day period.<sup>173</sup>

### *Police and Fire Protection Personnel*

The FLSA provides two special exemptions for employees engaged in fire protection and law enforcement activities. For purposes of these exemptions, an employee engaged in fire protection activities is defined as any employee who meets the following criteria:

- (1) Is employed by an organized fire department or fire protection district;
- (2) To the extent required by state statute or local ordinance, has been trained and has legal authority and responsibility to engage in the prevention, control, or extinguishment of a fire of any type, *and*
- (3) Performs activities which are required for, and directly concerned with, the prevention, control, or extinguishment of fires.<sup>174</sup>

An employee who meets these criteria is considered to be engaged in fire protection activities even if considered a trainee or probationary employee.

Among the fire department employees generally regarded as engaged in fire protection activities are firefighters, engineers, hose or ladder operators, fire specialists, fire inspectors, lieutenants, captains, fire marshals, battalion chiefs, deputy chiefs, chiefs, and rescue and ambulance service personnel who form an integral part of the public agency's fire protection activities. Also included in this definition are employees who work for forest conservation agencies or other public agencies charged with forest fire spotting or fighting responsibilities.<sup>175</sup> Civilian employees of a fire department such as dispatchers, alarm operators, maintenance workers, cooks, and clerks are not considered to be engaged in fire protection activities.<sup>176</sup>

The FLSA definition of an "employee engaged in law enforcement activities" refers to an employee who meets the following criteria:

- (1) Is a uniformed or plain clothes member of a body of officers and subordinates who are empowered by statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes,
- (2) Has the power of arrest, *and*

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<sup>173</sup>Wage-Hour Opinion Letter No. 537 (Dec. 2, 1966).

<sup>174</sup>29 C.F.R. § 553.210(a).

<sup>175</sup>29 C.F.R. § 553.210(a)(b).

<sup>176</sup>29 C.F.R. § 553.210(c).

- (3) Is presently undergoing, has undergone, or will undergo on-the-job training and/or a law enforcement course of instruction and study.<sup>177</sup>

Employees who meet this criteria are considered to be engaged in law enforcement activities even if considered to be a trainee or probationary employee.

Employees typically engaged in law enforcement activities include city police, sheriffs, deputy sheriffs, court marshals and deputy marshals, constables and deputy constables, and security personnel in correctional institutions.<sup>178</sup> City jails and precinct house lock-ups are generally considered to fall within the definition of a correctional institution.<sup>179</sup> Employees of correctional institutions who qualify as security personnel are those who have responsibility for controlling and maintaining custody of inmates whether their duties are performed inside or outside the institution.

Elected law enforcement officials who are not subject to the civil service laws of the particular jurisdiction are not considered to be engaged in law enforcement activities for purposes of these exemptions.<sup>180</sup> Other employees who normally do not meet the test of employees engaged in law enforcement activities include building inspectors, health inspectors, animal control personnel, civilian traffic employees, and building guards whose primary duty is to protect the lives and property of persons within the limited area of the building.<sup>181</sup>

An employee who spends twenty percent (20%) or more of his time performing non-exempt work will not be considered to be engaged in fire protection or law enforcement activities.<sup>182</sup> However, this limitation is not affected by law enforcement or fire protection employees who undertake employment for the same employer on an occasional or sporadic and part-time basis in a different capacity from their regular employment.<sup>183</sup> Employees who engage in both fire protection and law enforcement activities are entitled to the applicable 7(k) standard<sup>184</sup> which applies to the activity in which the employee spends a majority of work time during the work

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<sup>177</sup>29 C.F.R. § 553.211(a).

<sup>178</sup>29 C.F.R. § 533.211(c), (f).

<sup>179</sup>29 C.F.R. § 553.211(f).

<sup>180</sup>29 C.F.R. § 553.211(d).

<sup>181</sup>29 C.F.R. § 553.211(e).

<sup>182</sup>29 C.F.R. § 553.212(a).

<sup>183</sup>29 C.F.R. § 553.212(b).

<sup>184</sup>See discussion of the Section 7(k) exemption below.

period.<sup>185</sup>

Trainees who attend a bona fide fire or police training facility, when required by the employing agency, are considered to be engaged in fire protection or law enforcement activities if they meet the applicable test set out above.<sup>186</sup> Ambulance and rescue service employees of a public agency also may be treated as employees engaged in fire protection or law enforcement activities if they receive training in the rescue of fire and accident victims or fire fighters injured in the performance of their fire fighting duties and the ambulance and rescue service employees are regularly dispatched to fire, riots, natural disasters, and accidents.<sup>187</sup>

#### *Exemption for Public Agencies with Fewer Than Five Employees*

The FLSA provides a *complete overtime pay exemption* for any employee of a public agency engaged in fire protection or law enforcement activities, if the public agency employs less than five (5) employees.<sup>188</sup> Law enforcement and fire protection are considered separately for purposes of determining whether there are five (5) employees. Therefore, if a public agency employs less than five (5) employees in fire protection activities but five (5) or more employees in law enforcement activities, the agency may claim the exemption for the fire protection employees but not for the law enforcement employees.<sup>189</sup> Furthermore, the public agency is only required to count employees who are engaged in fire protection or law enforcement activities and not the agency's civilian employees such as clerical workers.

This exemption applies on a workweek basis. Consequently, the exemption may apply in certain workweeks, but not in others.<sup>190</sup>

#### *Section 7(k) Partial Overtime Exemption for Fire Protection and Law Enforcement Employees*

Generally, the FLSA requires employees to be paid one and one-half (1½) times their regular rate of pay for all hours worked over forty (40) in a workweek. Section 7(k) of the Act provides an exception to this general rule by allowing work periods of seven (7) to twenty-eight (28) days for purposes of computing overtime compensation due employees engaged in fire protection or law enforcement activities.<sup>191</sup>

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<sup>185</sup>29 C.F.R. § 553.213(a), (b).

<sup>186</sup>29 C.F.R. § 553.214.

<sup>187</sup>29 C.F.R. § 553.215(a).

<sup>188</sup>29 U.S.C. § 213(b)(20).

<sup>189</sup>29 C.F.R. § 553.1(d).

<sup>190</sup>29 C.F.R. § 553.200(c).

<sup>191</sup>29 U.S.C. § 207.(k).

Under Section 7(k), overtime compensation is due an employee engaged in fire protection activities only for those hours in excess of 212 in a twenty-eight (28) day period, or any proportionate number of hours worked in a fewer number of days.<sup>192</sup> Overtime compensation is due an employee engaged in law enforcement activities only for hours worked in excess of 171 in a twenty-eight (28) day period or for a proportionate number of hours worked in a fewer number of days.<sup>193</sup> The Labor Department’s table of work periods and maximum hours found in 29 C.F.R. § 553.230 is reprinted below:

Work period (days)	Maximum hours standards	
	<i>Fire Protection</i>	<i>Law Protection</i>
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	126
20	151	122
19	144	116
18	136	110
17	129	104
16	121	96
15	114	92
14	106	86
13	96	79
12	91	73
11	83	67

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<sup>192</sup>29 C.F.R. § 553.230(c).

<sup>193</sup>29 C.F.R. § 553.230(b).

Work period (days)	Maximum hours standards	
10	76	61
9	68	55
8	61	49
7	53	43

### Hours Worked

#### *Overview*

A basic determination required for compliance with the FLSA is ascertainment of the hours worked (or compensable time) by an employee during a workweek. Court decisions construing the term “hours worked” make it clear that this term includes not only the time spent by an employee when he is engaged in performing the principal duties of the job but also time spent on incidental activities which are part of the employee’s principal duties. Also compensable is time spent by an employee on activities not integrated with his principal activities if the time is:

- (a) Spent for the employer’s benefit,
- (b) Controlled by the employer,
- (c) “Suffered or permitted” by the employer, *or*
- (d) In an activity requested by the employer.<sup>194</sup>

An employee is “suffered or permitted” to work if the employer knows or had reason to believe the employee is performing work.<sup>195</sup> This definition also applies to work performed away from the employer’s premises or job site.<sup>196</sup> The rules for determining whether time spent in particular situations are “hours worked” are discussed below.

#### *Determining Hours Worked*

##### *Waiting Time*

Time spent by an employee waiting before starting work because the employee arrived at work

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<sup>194</sup>29 C.F.R. §§ 785.6, .7.

<sup>195</sup>29 C.F.R. § 785.11.

<sup>196</sup>29 C.F.R. § 785.12.

earlier than required is not considered “hours worked.”<sup>197</sup> All hours spent by employees waiting while on duty must be counted as hours worked even though the employees are allowed to leave their job site.<sup>198</sup> Waiting time spent by an employee after being relieved from duty is not considered to be hours worked if:

- (1) The employee is completely relieved from duty and is allowed to leave his job,
- (2) The employee is told that he is relieved until a definite, specified time, and
- (3) The relief period is long enough for the employee to use the time as he sees fit.<sup>199</sup>

#### *On-Call time*

An employee who is required to remain on-call on the employer’s premises or so close to the employer’s premises that the employee cannot use the time effectively for his purposes is considered to be working while “on-call.” An employee who is not required to remain on the employer’s premises but is required to leave word at his home or with municipal officials where he may be reached is not working while on call.<sup>200</sup> Furthermore, requiring an employee to wear a paging device while on call does not interfere with the employee’s freedom so as to make his time compensable.<sup>201</sup> However, all time spent by an employee called to perform work is considered to be compensable time.<sup>202</sup>

#### *Rest and Meal Periods*

The FLSA does not require employees to be given rest and meal periods.<sup>203</sup> However, if a rest period of less than twenty (20) minutes’ duration is given, the time spent during the rest period is considered to be compensable time.<sup>204</sup> A rest period of more than twenty (20) minutes will not be considered compensable if:

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<sup>197</sup>29 C.F.R. §§ 790.6(b), 790.7(b), (h).

<sup>198</sup>29 C.F.R. § 785.15.

<sup>199</sup>29 C.F.R. § 785.16.

<sup>200</sup>29 C.F.R. § 785.17.

<sup>201</sup>Wage-Hour Opinion Letter No. 995 (May 28, 1969).

<sup>202</sup>Wage-Hour Opinion Letter No. 777 (March 18, 1968).

<sup>203</sup>Wage-Hour Opinion Letter No. 936 (January 16, 1969); Wage-Hour Opinion Letter (Oct. 22, 1941).

<sup>204</sup>29 C.F.R. § 785.18.

- (1) The employee is free to leave the job site,
- (2) The rest period is long enough to allow the employee freedom to do as he pleases, *and*
- (3) There is no attempt to evade the FLSA.<sup>205</sup>

Meal periods of thirty (30) minutes or longer are not compensable if the employee is completely relieved of all duties.<sup>206</sup> While an employee must be free to leave his work station, the employee can be confined to the plant premises without having to be compensated.<sup>207</sup>

Although the above rules apply to law enforcement personnel, special rules apply to fire protection employees paid according to the special 7(k) exemption.<sup>208</sup> Where the public agency chooses to use the Section 7(k) exemption for firefighters, meal time cannot be excluded from hours worked if the firefighter works a shift of 24 hours duration or less.<sup>209</sup> Meal time can be excluded from compensable hours for fire protection personnel who work shifts of more than 24 hours so long as the regular tests for deducting meal time are met.

#### *Sleeping Time*

There are two general FLSA policies regarding the compensability of sleeping time. Sleeping time is considered to be compensable working time for employees who work shifts of less than 24 hours.<sup>210</sup> Time spent sleeping is not considered compensable time for employees whose shifts last 24 hours or longer if:

- (1) An express or implied agreement excluding sleep time exists,
- (2) Adequate sleeping facilities are furnished, *and*
- (3) At least five (5) hours of sleep is possible during the scheduled sleeping periods.<sup>211</sup>

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<sup>205</sup>Wage-Hour Opinion Letter Aug. 23, 1944).

<sup>206</sup>29 C.F.R. § 785.19.

<sup>207</sup>29 C.F.R. § 785.19(b).

<sup>208</sup>29 C.F.R. § 553.223(b), (c).

<sup>209</sup>29 C.F.R. § 553.223(c).

<sup>210</sup>29 C.F.R. § 785.21.

<sup>211</sup>29 C.F.R. § 785.22.

Interruptions to perform duties are considered hours worked and the entire sleeping period must be counted as hours worked if there are interruptions to the extent that the employee cannot get a reasonable night's sleep.<sup>212</sup>

The general rules regarding sleeping time also apply to law enforcement and fire protection personnel with one exception. The sleeping time of law enforcement and fire protection personnel who are paid according to the Section 7(k) exemption can be deducted *only if* the employees work shifts of *more* than 24 hours.<sup>213</sup>

### *Lectures, Meetings, and Training Programs*

Time spent attending lectures, meetings, and training programs is not counted as hours worked if:

- (1) Attendance is outside of the employee's regular working hours,
- (2) Attendance is voluntary,
- (3) The activity is not directly related to the employee's job, *and*
- (4) The employee does not perform any productive work during the program.<sup>214</sup>

Attendance is not voluntary if the employee is led to believe that his employment or working conditions will be adversely affected by non-attendance.<sup>215</sup> The activity is considered to be "directly related to the employee's job" and therefore compensable, if it is designed to make the employee handle his job more effectively as distinguished from training the employee for another job. Conversely, a course meant to prepare the employee for advancement by teaching him new skills is not considered directly related to the employee's job even though the course

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<sup>212</sup>29 C.F.R. § 785.22(b).

<sup>213</sup>29 C. F.R. § 553.222(b).

<sup>214</sup>29 C.F.R. § 785.27.

<sup>215</sup>29 C.F.R. § 785.28.

incidentally improves his skill in doing his regular work.<sup>216</sup>

### *Travel Time*

The FLSA does not count as compensable time the time spent traveling between home and work before or after regular working hours.<sup>217</sup> Time spent by an employee traveling from job site to job site during his work day is compensable time.<sup>218</sup>

An employee who is sent out of town for a one day assignment is not entitled to compensation for the time he spends in traveling between his home and the local railroad, bus terminal, or airport. However, he must be paid for all other travel time except the time spent in eating.<sup>219</sup>

An employee must be paid for all time, except meal periods, spent traveling overnight on business during his normal working hours whether on regular work days or non-working days.<sup>220</sup> The employee is not required to be paid for travel time outside of his normal working hours, except for any time actually spent performing duties.<sup>221</sup>

### *Medical Examinations*

Time spent by an employee waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked.<sup>222</sup>

### *Substitution of Work*

The FLSA allows individuals employed in any occupation by the same public agency to agree to substitute for one another during scheduled work hours in performance of work in the same capacity. When employees trade hours, each employee must be credited as if he had worked his normal work schedule for that shift if the following conditions are met:

- (1) The employees decided on their own to trade shifts,

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<sup>216</sup>29 C.F.R. § 785.29.

<sup>217</sup>29 C.F.R. § 785.35.

<sup>218</sup>29 C.F.R. § 785.38.

<sup>219</sup>29 C.F.R. § 785.37.

<sup>220</sup>29 C.F.R. § 785.39

<sup>221</sup>29 C.F.R. §§ 785.39, .41.

<sup>222</sup>29 C. F.R. § 785.43.

- (2) The trade was approved beforehand by the public agency, *and*
- (3) The decision to substitute was made freely and without coercion.<sup>223</sup>

A public agency that employs individuals who substitute or trade time is not required to keep records of the hours of the substitute work.<sup>224</sup>

### Minimum Wage

As of September 1, 1997, the FLSA requires that all covered, non-exempt employees must be paid a minimum hourly wage of at least \$5.15 per hour for each “hour worked.”<sup>225</sup> There is no prohibition against any payroll deduction that does not reduce the employee’s average hourly pay to less than the minimum wage.<sup>226</sup> However, the following deductions are allowed even though they reduce the employee’s average hourly pay to *less* than the minimum wage:

- (1) Deductions for the reasonable cost of board, lodging, and other facilities;
- (2) Amounts deducted for taxes;
- (3) Payments to third persons pursuant to a court order; *and*
- (4) Payments to an employee’s assignee.<sup>227</sup>

The reasonable costs of fair value of food, lodging, and other facilities which are customarily furnished to employees can be taken as a credit toward meeting the minimum wage.<sup>228</sup> Reasonable cost of fair value does not include a profit to the employer.<sup>229</sup> The cost of furnishing facilities that are primarily for the benefit or convenience of the employer cannot be claimed as a credit toward the minimum wage.<sup>230</sup>

Deductible taxes include all federal, state, and local taxes, levies, and assessments including

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<sup>223</sup>29 U.S.C. § 207(p)(3).

<sup>224</sup>29 U.S.C. § 211(c).

<sup>225</sup>29 U.S.C. § 206(a)(1).

<sup>226</sup>29 C.F.R. § 531.36(a).

<sup>227</sup>29 C.F.R. §§ 531.29, 531.38, and 531.40.

<sup>228</sup>29 U.S.C. § 203(m).

<sup>229</sup>29 C.F.R. § 531.33(b).

<sup>230</sup>29 C.F.R. § 531.32(c).

social security and state unemployment insurance taxes.<sup>231</sup> Payments to third persons that can be deducted include payments to a creditor of the employee under garnishment, wage attachment, or bankruptcy proceeding.<sup>232</sup> Finally, the Act allows deductions from wages for sums voluntarily assigned by an employee to a creditor, donee, or other third party if neither the employer, directly or indirectly, derives any benefit from the transaction.<sup>233</sup> Among the sums deemed to be paid to the employee although assigned to third persons include payments for insurance premiums and voluntary contributions to churches and charitable, fraternal, athletic, and social organizations from which the employer receives no direct benefit.<sup>234</sup>

## Overtime Pay

### *Overview*

The FLSA generally requires employers to pay all covered, non-exempt employees one and one half (1½) times their regular rate of pay for all hours worked over 40 in a workweek.<sup>235</sup> An employee's "regular rate" is equal to his total pay for the workweek divided by the number of hours actually worked by the employee during that week.<sup>236</sup> A workweek is a fixed and regularly recurring period of 168 hours, or seven (7) consecutive 24-hour periods. The beginning of a workweek may be changed if the change is intended to be permanent.<sup>237</sup>

The FLSA does not require that an employee be paid on a weekly basis. The employer may pay the employee at other regular intervals, such as daily, weekly, bi-weekly, or monthly, as long as the compensation earned by an employee in a particular workweek is paid on the regular pay day for the period in which the workweek ends.<sup>238</sup>

### *Exclusions From Regular Rate*

The regular rate includes all remuneration for employment paid to or on behalf of an employee, except specifically designated payments. These payments include:

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<sup>231</sup>29 C.F.R. § 531.38.

<sup>232</sup>29 C.F.R. § 531.39.

<sup>233</sup>29 C.F.R. § 531.40(a).

<sup>234</sup>29 C.F.R. § 531.40(c).

<sup>235</sup>29 U.S.C. § 207(a).

<sup>236</sup>29 C.F.R. § 778.109.

<sup>237</sup>29 C.F.R. § 778.105.

<sup>238</sup>29 C.F.R. §§ 778.104, 106.

- (a) Certain bonuses,
- (b) Gifts,
- (c) Reimbursement for expenses,
- (d) Payment for idle hours, *and*
- (e) On-call pay.

### *Bonuses*

Bonuses must be analyzed carefully to determine if they must be included in an employee's total compensation. Bonuses that must be included will increase the employee's regular rate and his total compensation during workweeks in which overtime hours are worked.

Bonuses may be excluded from an employee's regular rate if: (1) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer, (2) these decisions are made at or near the end of the period for which the bonus is being given, and (3) the bonus is not given pursuant to any contract, agreement, or promise causing the employee to expect a regular bonus.<sup>239</sup> Thus, discretionary bonuses, such as Christmas bonuses, are not included in the regular rate.<sup>240</sup> However, non-discretionary bonuses must be totaled with other earnings to determine the employee's regular rate on which overtime pay must be computed. Examples of includable bonuses are attendance bonuses, production bonuses, bonuses for quality and accuracy of work, efficiency bonuses, and length of service bonuses.<sup>241</sup>

### *Gifts*

The FLSA also excludes the value of gifts from an employee's remuneration used to figure his regular rate.<sup>242</sup> A payment that is measured by hours worked, production, or efficiency or that is so substantial that employees consider it part of their wages is not considered a gift. Furthermore, a payment made pursuant to a contract is not a gift.<sup>243</sup>

A gift remains excludable even though it is paid with such regularity that employees are led to expect its continuance. Also excludable are bonuses that vary for different employees on the

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<sup>239</sup>29 U.S.C. § 207(e)(3).

<sup>240</sup>29 C.F.R. § 778.211(b).

<sup>241</sup>29 C.F.R. § 778.211(c).

<sup>242</sup>29 U.S.C. § 207(e)(1).

<sup>243</sup>29 C.F.R. § 778.212(b).

basis of salary, hourly rate, and length of service.<sup>244</sup>

### *Expenses*

Expenses the employee incurs in furtherance of his employer's interests are excludable from the employee's regular rate.<sup>245</sup> This exclusion is limited to reimbursements that reasonably approximate the expenses incurred.<sup>246</sup> Thus, any part of a reimbursement that exceeds the employee's actual expenses must be included in the regular rate.<sup>247</sup>

### *Payment For Idle Hours*

Payments which are made for occasional periods when an employee is not at work due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar circumstances, are not considered to be compensation for the employee's hours of employment. Therefore, such payments may be excluded from the regular rate of pay but may not be credited toward overtime compensation due under the Act.<sup>248</sup>

The term "failure of the employer to provide sufficient work" refers to occasional, sporadically recurring situations when the employee would normally be working if it were not for factors such as machinery breakdown, failure of expected supplies to arrive, weather conditions affecting the ability of the employee to perform the work, and other unpredictable obstacles beyond the control of the employer.<sup>249</sup> Other similar causes include absence due to jury duty, attending a funeral of a family member, and inability to reach the work place because of weather conditions.<sup>250</sup>

Sometimes employees who are entitled to holiday or vacation pay forego the time off and perform work for the employer on the holiday or during the vacation period. If the employee receives holiday or vacation pay, and also receives pay at his customary rate for the hours worked on the holiday or vacation day, the sum allocable to holiday or vacation pay is excludable from the regular rate.<sup>251</sup>

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<sup>244</sup>29 C.F.R. § 778.212(c).

<sup>245</sup>29 U.S.C. § 207(e)(2).

<sup>246</sup>29 C.F.R. § 778.217(a).

<sup>247</sup>29 C.F.R. § 778.217(c).

<sup>248</sup>29 U.S.C. § 207(e)(2).

<sup>249</sup>29 C.F.R. § 778.218(c).

<sup>250</sup>29 C.F.R. § 778.218(d).

<sup>251</sup>29 C.F.R. § 778.219(a).

### *Show-Up and On-Call Pay*

“Show-up pay” can be paid to employees who report to work and find no work or less than a minimum amount of work available. The portion of the show-up pay that represents compensation at the applicable rate for the straight-time or overtime hours actually worked can be credited as straight-time or overtime compensation. The amount of show-up pay covering time not worked can be excluded from the computation of the employee’s regular rate but cannot be credited toward the overtime compensation due the employee.<sup>252</sup>

On-call pay is given to an employee as compensation for those hours that the employee agrees to respond if called upon by the employer to perform work. On-call pay must always be included in the computation of the employee’s regular rate.<sup>253</sup>

### *Reducing Overtime Liability*

The FLSA provides several special plans for reducing overtime liability. Because of the complexity of many of these plans, however, only two of the plans generally will be of practical use to municipalities. The first of these plans involves the use of compensatory time off and the second is referred to as the “coefficient plan.”

### *Compensatory Time Off*

The 1985 Amendments to the FLSA allow municipalities to use compensatory time off in lieu of cash overtime compensation required by the Act.<sup>254</sup> An “employer is free to require an employee to take time off of work, and an employee is also free to use the money it would have paid in wages to cash out accrued compensation time.”<sup>255</sup> Compensatory time may be given as a substitute for overtime pay if given:

1. Pursuant to any agreement, such as a collective bargaining agreement between the public agency and representatives of its employees; *or*
2. Pursuant to an agreement arrived at between the employer and employee *before* performance of the work; *or*
3. To employees hired prior to April 15, 1986, and provided pursuant to a regular practice in effect on that date.

The Amendments also provide certain limitations on the amount of compensatory time that can

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<sup>252</sup>29 C.F.R. § 778.220(a).

<sup>253</sup>29 C.F.R. § 778.223.

<sup>254</sup>29 U.S.C. § 207(o).

<sup>255</sup>*Christensen v. Harris County*, 529 U.S. 576, 585 (2000).

be given. First, compensatory time must be given at the rate of one and one half (1½) hours for each hour of employment for which overtime compensation would otherwise be required. Furthermore, the total amount of compensatory time that an employee can accrue is limited. Seasonal employees or employees whose work includes activities in public safety or emergency response can accrue a maximum of 480 hours of compensatory time. All other employees can accrue no more than 240 hours of compensatory time.

Any employee who has reached these compensatory time limits must be paid overtime compensation for additional overtime hours of work at the rate of one and one half (1½) times the employee's regular rate of pay. An employee who has accrued compensatory time at the time of termination of employment must be paid for the unused compensatory time at a rate of compensation not less than the greater of:

1. The average regular rate received by the employee during the last three (3) years of the employee's employment; *or*
2. The final regular rate received by the employee.

Finally, an employee must be allowed to use his compensatory time off within a reasonable time after making a request to do so if use of the compensatory time does not "unduly disrupt" the operations of the municipality.

It is important to understand that compensatory time off is not synonymous with an exemption from coverage but only provides municipalities with some relief. It is still critical for a municipality to reduce liability for compensatory time off as illustrated by the following example.

Assume that a municipality has twenty firefighters working shifts of 24 hours on and 48 hours off. In a 28-day period, each firefighter will work an average of 9⅓ shifts or 224 hours. Unless the firefighters are on a special plan, they will be entitled to overtime after 40 hours in each 7-day period. For simplicity, assume that overtime will be due after 160 hours in a 28-day period. Thus, each firefighter will work 64 overtime hours in each 28-day period and will accrue 96 hours of compensatory time (1½ times 64 hours) in each 28-day period. In less than five months, each firefighter will accrue the maximum of 480 hours of compensatory time which can be accumulated under the Act. The employee then will have to be compensated at one and one-half (1½) times his regular rate for all additional overtime hours and thus will be entitled to *480 hours times* his regular hourly rate of pay upon termination of employment unless he is allowed to take some or all of this time off.

This example shows how quickly employees can accumulate a tremendous amount of compensatory time that, when taken as time off, can be extremely inconvenient. In addition, accumulated compensatory time must be viewed as a liability because of the requirement that terminated employees must be paid for all accumulated compensatory time. Consequently, it is imperative for a municipality to keep compensatory time to a minimum.

### *Coefficient Plan*

The FLSA allows the payment of a fixed weekly wage to an employee with the understanding that the salary is to compensate him for all hours worked during any particular workweek. Since the agreement specifies no definite number of weekly working hours, there can be no fixed regular rate. The rate varies from week to week depending upon the number of hours worked and is figured by dividing the fixed weekly wage by the total hours worked during the week. Thus, the regular rate decreases as the number of hours worked increases.

An employee on the coefficient plan is entitled only to one half ( $\frac{1}{2}$ ) of his regular rate for hours worked in excess of 40 in a workweek because his weekly wages include straight time for all overtime hours. Such a system is permissible as long as there is a clear mutual understanding between the parties.<sup>256</sup>

The coefficient plan is illustrated by the following example. Assume that a municipality agrees to pay an employee a fixed salary of \$200 per week for all hours worked. If the employee works 40 hours in a workweek, his regular rate of pay is \$5.00 per hour (\$200.00 divided by 40 hours). However, if the employee works 50 hours in a workweek, his regular rate is \$4.00 per hour (\$200.00 divided by 50 hours). Since the employee has worked 10 hours of overtime (50 hours minus 40 hours), he is entitled to overtime compensation for those hours at one and one-half ( $1\frac{1}{2}$ ) times his regular rate. However, he has already received payment for those hours at his regular rate of \$4.00 per hour, and therefore is entitled only to an additional half time or \$2.00 per hour for ten hours. Thus, the employee will be entitled to \$20 in overtime pay and a total of \$220 in the workweek.

Without such a plan, the employee in the above example who received a salary of \$200 per week and worked 50 hours in a week will have a regular rate of \$5.00 per hour (\$200 divided by 40 hours). The employee will be entitled to one and one-half ( $1\frac{1}{2}$ ) times this regular rate for his 10 overtime hours for a total of \$75.00 of overtime compensation. This will raise the employee's total compensation for the week to \$275 or \$55 more than the employee on the coefficient plan.

### *Child Labor*

The FLSA restricts, and in some cases prohibits, the employment of persons under 18 years of age in certain occupations and limits their working hours. Once a person reaches the age of 18 years, the FLSA does not restrict his employment.<sup>257</sup>

The FLSA does not restrict the number of hours that 16 and 17 year old employees can work and allows such employees to work during school hours. Outside of agriculture, however, a person must be at least 18 years of age before he can be employed in certain occupations deemed to be hazardous by the Secretary of Labor. Included in these hazardous occupations are motor-vehicle

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<sup>256</sup>29 C.F.R. § 778.114.

<sup>257</sup>29 U.S.C. § 203 (1).

drivers and driver's helpers on any public road or highway. The prohibition does not apply to 16 and 17 year old employees who operate automobiles or trucks not exceeding 6,000 pounds gross vehicle weight if:

- (1) Driving is restricted to daylight hours;
- (2) Operation of the vehicle is only occasional and incidental to the employment;
- (3) The employee holds a driver's license that is valid for the job he performs;
- (4) The employee has completed a state-approved driver education program;
- (5) The vehicle is equipped with a seat belt or similar device for the driver and each helper; *and*
- (6) The employer has instructed each employee under 28 years of age that the seat belts or other devices that are provided must be used.<sup>258</sup>

The exception outlined above does not apply if the vehicle driver's duties include towing of vehicles.

Among occupations that 14 and 15 year old employees cannot perform include:

- (1) Manufacturing operations;
- (2) Occupations requiring the performance of any duties in a workroom or workplaces where goods are manufactured;
- (3) Occupations involving the operation or tending of hoisting apparatuses or any power-driven machinery other than office machines;
- (4) The operation of motor vehicles or service as helpers on such vehicles; *and*
- (5) Occupations other than office and sales work connected with warehousing and storage.<sup>259</sup>

Finally, the FLSA places the following additional restrictions on the employment of 14 and 15 year old employees:

- (1) May be employed only outside of school hours;

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<sup>258</sup>29 C.F.R. § 570.52(b)(1).

<sup>259</sup>29 C.F.R. § 570.119.

- (2) May be employed for no more than three (3) hours on any school day and eight (8) hours on any non-school day;
- (3) May work no more than eighteen (18) hours in a school week and forty (40) hours in a non-school week; *and*
- (4) Must perform all work between 7:00 a. m. and 7:00 p.m. except that work may be performed until 9:00 p.m. during the period from June 1 through Labor Day.<sup>260</sup>

### Posting and Record Keeping

Municipalities subject to the FLSA must post the Labor Department's notice of minimum wage and overtime requirements. This must be posted in all places normally used for posting information for employees.<sup>261</sup>

Municipalities subject to the FLSA also are required to keep records of their employees concerning their wages, hours, and other conditions of employment as the Wage-Hour Administrator prescribes. The Administrator's regulations specify no particular form for keeping records but require that such records show the following data for each employee:

- (1) Name and identifying number or symbol;
- (2) Home address;
- (3) Date of birth if under 19;
- (4) Occupation in which employed;
- (5) Time of day and day of the week in which the employee's workweek begins;
- (6) Regular hourly rate of pay for weeks when overtime is worked, basis on which wages are paid, and amount and nature of each payment not included in the regular rate;
- (7) Hours worked each work day and total hours worked each workweek;
- (8) Total daily or weekly straight-time earnings or wages;
- (9) Total weekly overtime compensation;
- (10) Total additions to or deductions from wages paid each pay period;

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<sup>260</sup>29 C.F.R. § 570.119.

<sup>261</sup>29 C.F.R. § 516.4.

(11) Total wages paid each pay period; *and*

(12) Date of payment and the pay period covered by payment.<sup>262</sup>

All records should be preserved for two to three (2-3) years.<sup>263</sup>

Only the information required in numbers 1 through 4 above and the place of employment must be kept for employees exempt from both the minimum wage and overtime pay requirements of the Act.<sup>264</sup> Records containing the information listed above, except the information in numbers 6 through 9, must be kept for employees who are exempt from only the overtime pay requirements of the Act. However, these records must contain the basis on which wages are paid.<sup>265</sup>

The records that must be kept for hospital employees compensated for overtime work on the basis of a 14-day work period<sup>266</sup> include all information in paragraphs 1 through 4, 6, and 10 through 12 above. In addition, the following records must be kept:

- (1) Time of day and day of week on which the employee's work period begins;
- (2) Hours worked each work day and total hours worked each 14-day work period;
- (3) Total straight-time wages paid for hours worked during the 14-day period; *and*
- (4) Total overtime compensation paid for hours worked in excess of eight (8) in a work day and eighty (80) in a work period.<sup>267</sup>

In addition, employers paying hospital employees under a 14-day plan must maintain a copy of the agreement between the employer and employee allowing the use of the 14-day period for overtime computation. If such a document does not exist, it is sufficient to keep a memorandum summarizing the terms of the agreement and showing the date and length of the agreement.<sup>268</sup>

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<sup>262</sup>29 C.F.R. § 516.2.

<sup>263</sup>29 C.F.R. §§ 516.5, 6.

<sup>264</sup>29 C.F.R. § 516.11.

<sup>265</sup>29 C.F.R. § 516.12.

<sup>266</sup>See discussion under "Hospital Employees" above.

<sup>267</sup>29 C.F.R. § 516.23(a).

<sup>268</sup>29 C.F.R. § 23(b).

## Enforcement

The primary responsibility for enforcing compliance with the FLSA rests with the Wage and Hour Division of the Department of Labor which is headed by the Wage-Hour Administrator. The Administrator or his designated representative has the power to investigate wages, hours, and other conditions of employment of covered employees, and review the employer's records to determine whether there has been a violation.<sup>269</sup> The Administrator may issue subpoenas for the production of records and enforce the subpoenas in a federal district court.<sup>270</sup> The Administrator's powers are limited only to the extent that he acts arbitrarily or in excess of his statutory authority. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946).

The Administrator or his designated representative can make routine compliance investigations or make investigations upon the complaint of an employee to determine if violations are being committed. If an investigation discloses violations and the employer does not voluntarily come into compliance, the Administrator may: (1) seek an injunction to restrain the employer from violating the law; (2) bring suit to recover the back minimum wages and overtime pay owed to the employee plus an equal additional amount as liquidated damages; or (3) do both (1) and (2) above. Criminal actions may be brought by the Department of Justice against willful violators of the Act.<sup>271</sup>

Employees may also file suit themselves to recover back wages due under either the minimum wage or overtime provisions plus an additional equal amount as liquidated damages. A prevailing employee may also request a reasonable attorney's fee as part of the cost.

The Administrator or an employee may sue in any state or federal court of competent jurisdiction in order to enforce FLSA rights. While the Administrator may sue on behalf of all aggrieved employees, an employee cannot represent other allegedly aggrieved individuals in an FLSA action unless they file a written consent to "opt-in" the litigation.<sup>272</sup> An action under the FLSA must be initiated within two (2) years of the date of a non-willful violation or three (3) years from the date of a willful violation.<sup>273</sup> The term "willful" is broadly defined and includes all circumstances in which the employer knew or suspected that its action might violate the FLSA.<sup>274</sup> Courts have the discretion to deny or reduce the amount of liquidated damages in a suit where the employer proves that he acted in good faith and with reasonable grounds for

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<sup>269</sup>29 U.S.C. § 211(a).

<sup>270</sup>29 U.S.C. § 209.

<sup>271</sup>29 U.S.C. § 216(a).

<sup>272</sup>29 U.S.C. § 216(b).

<sup>273</sup>29 U.S.C. § 255.

<sup>274</sup>29 U.S.C. § 255(a); *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5<sup>th</sup> Cir. 1972).

believing that no violation was being committed.<sup>275</sup>

The Administrator is authorized to supervise the payment of unpaid minimum wages or unpaid overtime compensation due any employee. Payment of the amount determined by the Administrator to be due and agreement by an employee to accept such payment, upon payment in full, constitutes a waiver of any right the employee may have to recover such back pay and any liquidated damages.

An employer who is found to be in violation of the FLSA in an injunction action by the Secretary of Labor must pay the back wages due employees as directed by the Court and is enjoined from future unlawful conduct.<sup>276</sup> If the employer violates the FLSA in the future, the Secretary may ask that the employer be adjudged in contempt of court, including criminal contempt if the violation was willful.

An employer who is found to be in violation of the FLSA in either an Administrator's back pay suit or an employee wage suit may be required to pay back pay accruing up to three (3) years prior to the filing of the lawsuit plus an equal amount as liquidated damages. In an employee's suit, the employer may also be required to pay the employee's attorney's fees.<sup>277</sup>

The Department of Justice may file criminal actions which could lead to fines of up to \$10,000, or in the case of a second offender, to imprisonment up to six (6) months. Such actions may be filed whenever the violations are considered willful, *i.e.* deliberate, voluntary, and intentional, as distinguished from violations committed through inadvertence, accidents, or ordinary negligence. *Nabob Oil Co. v. U.S.*, 190 F.2d 478 (10<sup>th</sup> Cir. 1951), *cert. den.* 342 U.S. 876 (1951).

## Equal Pay Act

### Coverage

The Equal Pay Act applies to all municipalities. Although the Equal Pay Act was an amendment to the Fair Labor Standards Act, the FLSA minimum wage and overtime exemptions are not generally applicable to equal pay cases.

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<sup>275</sup>29 U.S.C. § 260.

<sup>276</sup>29 U.S.C. § 217.

<sup>277</sup>29 U.S.C. § 216(b).

## Prohibited Conduct

The Equal Pay Act prohibits discrimination on the basis of sex in the wages paid for jobs which require equal skill, effort, and responsibility and which are performed under similar working conditions.<sup>278</sup> Jobs do not need to be identical to be covered by the Equal Pay Act but only substantially equal.<sup>279</sup>

Skills include such factors as experience, training, education, and ability.<sup>280</sup> Similarity of working conditions is determined by comparing job surroundings and hazards. Shift differentials are irrelevant. “Surroundings” encompass the type, intensity, and frequency of a worker’s exposure to elements such as toxic chemicals. “Hazards” include the type and frequency of physical hazards regularly encountered and the severity of injury that they can cause.<sup>281</sup>

A municipality is permitted to pay workers of one sex at a rate different from workers of the other sex if the differential results from a seniority system, a merit system, a system based on quantity or quality of production, or any other system that is not based on sex.<sup>282</sup> Cases necessarily involve detailed factual comparisons of different jobs. Courts tend to focus on distinctions and comparisons cited by the litigants on a case-by-case basis, rather than upon consistent principles of “substantial equality.” This method has resulted in conflicting decisions concerning the same job groups in different cases.<sup>283</sup>

## Procedure

An action under the Equal Pay Act must be initiated within two (2) years of the date of a non-willful violation or three (3) years from the date of a willful violation. The term “willful” for purposes of the limitations period is broadly defined and includes all instances in which the employer knew or showed reckless disregard as to whether his or its conduct was prohibited

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<sup>278</sup>29 U.S.C. § 206 (d)(1).

<sup>279</sup>*Brennan v. City Stores, Inc.*, 479 F.2d 235, 238 (5<sup>th</sup> Cir. 1973); *Cf. United States v. Milwaukee*, 441 F. Supp. 1371 (D.C. Wis. 1977) (municipality violated Equal Pay Act in paying male and female jailers differently where male and females received same training and had same performance requirements).

<sup>280</sup>29 C.F.R. § 1620.15.

<sup>281</sup>*Corning Glass v. Brennan*, 417 U.S. 188 (1974).

<sup>282</sup>29 U.S.C. § 206(d)(1).

<sup>283</sup>Compare *Hodgson v. Brookhaven Gen. Hospital*, 470 F.2d 729 (5<sup>th</sup> Cir. 1972); *Hodgson v. Golden Isles Nursing Home, Inc.*, 468 F.2d 1256 (5<sup>th</sup> Cir. 1972); *Hodgson v. Brookhaven Gen. Hospital*, 436 F.2d 719 (5<sup>th</sup> Cir. 1970).

under the Act.<sup>284</sup>

An investigation under the Act can be initiated by the EEOC either on its own initiative or after a charge has been filed by an individual.<sup>285</sup> The EEOC can initiate an investigation based on EEOC lists which show the industries or occupations having a high incidence of noncompliance, or on information submitted to the EEOC or obtained during the course of the EEOC investigation of an individual's Equal Pay Act complaint.<sup>286</sup> Investigations can include interviews of employer representatives, past and present employees and applicants, as well as interviews of outside parties.<sup>287</sup>

The EEOC will issue a letter of determination if it finds the municipality has violated the ACT and the municipality refuses to enter into a settlement agreement.<sup>288</sup> If the municipality enters into a settlement agreement, it will be liable for back pay to all affected employees and will have to raise the wage rates of the lower-paid sex to the level of the higher paid sex.<sup>289</sup> The EEOC or the aggrieved person may also file suit against the municipality, but a suit by the EEOC extinguishes the aggrieved person's right to sue.<sup>290</sup>

An individual can file an Equal Pay Act charge with the EEOC or can file suit against the municipality without filing a charge. If an EEOC charge is filed, the EEOC will interview the charging party to determine if there is reasonable cause to believe there has been a violation and whether other violations may exist.<sup>291</sup> Ordinarily, a fact finding conference will not be conducted by the EEOC. The EEOC can close its investigation whenever it determines that continued processing is inappropriate and the charging party can file suit against the employer at any time without receiving a "right to sue" letter.<sup>292</sup>

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<sup>284</sup>29 U.S.C. § 255(a); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); *Reich v. Bay, Inc.*, *BBI, Inc.*, 23 F.3d 110 (5<sup>th</sup> Cir. 1994).

<sup>285</sup>EEOC Compliance Manual Section 2.1, 8.1 and 22.8; 29 U.S.C. §211(a); 29 C.F.R. §1620.30.

<sup>286</sup>EEOC Compliance Manual Section 22.3(b)

<sup>287</sup>EEOC Compliance Manual Section 23.2.

<sup>288</sup>EEOC Compliance Manual Section 40.1.

<sup>289</sup>EEOC Compliance Manual Section 60.5(c)(2).

<sup>290</sup>29 U.S.C. § 216 (b).

<sup>291</sup>EEOC Compliance Manual Section 2.4.

<sup>292</sup>EEOC Compliance Manual Section 1.8(c) and Section 2.4(g)(3).

## Liability Exposure

A municipality found to be in violation of the Equal Pay Action may be required to pay all affected employees back pay accruing to a date of up to two (2) years prior to the filing of the charge and may be ordered to pay the plaintiff's attorneys fees.<sup>293</sup> The municipality also will be required to raise the wage rate of all affected employee to that of the higher paid sex. Wage rates cannot be equalized by reducing the rate of the higher paid sex.

## Uniformed Services Employment and Reemployment Rights Act of 1994

### Coverage and Prohibited Conduct

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) which went into effect December 12, 1994, is intended to assure non-career military service members that they can return to their jobs held prior to entering military service without losing benefits or seniority.<sup>294</sup>

In order to qualify for reemployment rights, a non-career military service member must meet five (5) conditions: (1) the employee must hold a civilian job; (2) the employee must give notice (written or verbal) to the employer that he will be leaving the job for military training or service; (3) the employee must not exceed a cumulative five-year limit of military service with that particular employer;<sup>295</sup> (4) the employee must have been released from the service under honorable conditions; and (5) the employee must report back to the civilian job in a timely manner or make a timely application for reemployment.

The time to report back to work or apply for reemployment after completed military training or service is based on the time spent on military duty. For service of less than 31 days, the employee must return at the beginning of the next regularly scheduled work period on the first full day after release from service, taking into account safe travel home plus an eight-hour rest period.<sup>296</sup> For service of more than 30 days, but less than 181 days, the employee must submit an application for reemployment within 14 days of release from service or, if submitting such application within such period is impossible or unreasonable through no fault of the person, the

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<sup>293</sup>29 U.S.C. § 216(b); U.S.C. § 255(a).

<sup>294</sup>38 U.S.C. 4311.

<sup>295</sup>This five-year limit is a cumulative length of time that an individual may be absent for military duty and retain reemployment rights. Military service performed before the employee began working for a particular employer is irrelevant for reemployment rights purposes. The cumulative five-year limit does not apply to most periodic and special Reserve National Guard training and most National Guard service during time of state or national emergency, initial enlistments lasting more than five years and involuntary active duty extensions and recalls.

<sup>296</sup>38 U.S.C. 4312(e)(1)(A).

next first full calendar day when submission of such application becomes possible.<sup>297</sup> For service of more than 180 days, an application for reemployment must be submitted within 90 days after completing the period of service.<sup>298</sup>

The position to which an individual is entitled to be reemployed is also dependent upon the employee's time spent on military duty. For service of less than 91 days, the individual is entitled to be reemployed in the position the individual would have held if the individual's employment had not been interrupted by military service, if the person is qualified to perform the duties of that position. If, after reasonable efforts by the employer to qualify the person, the person is not qualified to perform the duties of the position he would have held but for the interruption for military service, the person is entitled to be reemployed in the position the individual held on the date of the commencement of military service.<sup>299</sup>

For service of more than 90 days, an individual is entitled to be reemployed in the position the individual would have held if the individual's employment had not been interrupted by military service *or* to an equivalent position with like seniority, status, and pay, if the person is qualified to perform the duties of the particular position. If, after reasonable efforts by the employer to qualify the person, the individual is not qualified to perform the duties of the position he would have held but for the interruption by military service, the individual is entitled to be reemployed in the position the individual held on the date of the commencement of the service of the military service or another position of like seniority, status, and pay if the person is qualified to perform those duties.<sup>300</sup>

If a person has become disabled during their military service, and consequently is not qualified to hold the position the individual would have been entitled to if the individual's employment had not been interrupted by military service, the disabled individual is entitled to be reemployed in any other position which is equivalent in seniority, status, and pay, if the individual is qualified to perform or could become qualified to perform, with reasonable efforts by the employer, the duties of the alternate position.<sup>301</sup>

Another important component of USERRA is its prohibition on employment discrimination against military personnel based on their past, current, or future military obligations (38 U.S.C. § 4311). This discrimination ban prevents employers from denying initial employment, re-employment, retention in employment, promotion, or any benefit of employment based on an individual's membership, application for membership, performance of service, or application for service or obligation (*Id.*). Employers will have discriminated against an employee based on

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<sup>297</sup>38 U.S.C. 4312(e)(1)(C).

<sup>298</sup>38 U.S.C. 4312(e)(1)(D).

<sup>299</sup>38 U.S.C. 4313(a)(1).

<sup>300</sup>38 U.S.C. 4313(a)(2).

<sup>301</sup>38 U.S.C. 4313(a)(3).

their military service or obligation to serve if the employer used that employee's membership in the armed services as a motivating factor in its action to deny initial employment, reemployment, retention, or other benefits of employment. The employer may, however, avoid liability for discriminating under this section if it can prove that it would have taken the same action against this employee irrespective of his membership or application for membership in the armed services.

A returning veteran also is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.<sup>302</sup> A reemployed veteran is also protected from discharge without cause for a specified period of time based on length of service. For length of service of more than 30 days but less than 180 days, a reemployed veteran is protected for a period of 180 days after the date of reemployment. For length of service more than 180 days, a reemployed veteran is protected from discharge without cause for one year after the date of reemployment.<sup>303</sup> In addition, employers may not require an individual to use vacation, annual, or similar leave during any period of military service.<sup>304</sup>

Employees, or their dependents, with coverage under an employer's health plan are entitled to elect to continue coverage under the plan upon the commencement of military leave. The maximum period of coverage under such an election shall be the lesser of: (1) the 18-month period beginning on the date on which the person's absence begins or (2) on the day after the date on which the person fails to apply for or return to a position of employment.<sup>305</sup> An employee who elects to continue coverage under the health plan, except those employees whose time of leave is less than 31 days, may be required to pay a maximum of 102% of the full premium under the original plan. In addition, upon reemployment, veterans may not be subject to exclusions or waiting periods that would not otherwise have been imposed under the plan.<sup>306</sup>

Employers are also required to continue to contribute to any pension benefit plan offered by the employer during the employee's military leave.<sup>307</sup>

Mississippi law also grants municipal officers and employees the right to a leave of absence in

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<sup>302</sup>38 U.S.C. 4316(a).

<sup>303</sup>38 U.S.C. 4316(c).

<sup>304</sup>38 U.S.C. 4316(d).

<sup>305</sup>38 U.S.C. 4318(a)(1).

<sup>306</sup>38 U.S.C. 4317(b)(2). This limitation does not apply to the coverage of any illness or injury determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during performance of service in the uniformed services.

<sup>307</sup>38 U.S.C. 4318(b).

order to participate in the reserves of the United States Armed Forces. If the leave does not exceed 15 days, the leave shall be without loss of pay, time, annual leave, or efficiency rating. If the leave exceeds 15 days, it shall be without loss of seniority, annual leave, or efficiency rating. The employee is protected from discharge, without cause for one year.<sup>308</sup>

### Procedure and Liability

Any veteran who believes that his reemployment rights have been denied may file a written complaint with the Department of Labor. If, after an investigation, the Department finds that the individual's reemployment rights have been violated, the Department will informally attempt to resolve the complaint by making reasonable efforts to ensure that the individual's reemployment rights are honored. If reasonable efforts by the Department are unsuccessful, the Department may issue a notice of the complainant's entitlement to proceed in District Court. In addition to the requirement already imposed on an employer under USERRA, the court may also require the employer to compensate the aggrieved individual for any loss of wages or benefits suffered.<sup>309</sup> The court may also issue temporary or permanent injunctions, temporary restraining orders, and contempt orders. The court may also award the prevailing party reasonable attorney fees, expert witness fees, and other litigation expenses.<sup>310</sup>

### The Rehabilitation Act of 1973 and *Mississippi Code Ann.* § 43-66-15

#### Coverage

Section 503 of the Rehabilitation Act of 1973 applies to municipalities which have federal contracts or subcontracts exceeding \$10,000.<sup>311</sup> While § 504 applies to municipalities that are recipients of federal grants and federally assisted programs.<sup>312</sup> The obligations and enforcement procedures applied under § 503 are different from those applied under § 504. Mississippi law also includes a provision applicable to disabled individuals employed in state services, in the service of political subdivisions of the state, in public schools, or in any other employment supported in whole or in part by public funds.<sup>313</sup>

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<sup>308</sup>*Code*, §33-1-21(a).

<sup>309</sup>*Wallace v. Hardee's, Inc. of Oxford*, 800 F. Supp 806 CM. D. Ala. 1994).

<sup>310</sup>38 U.S.C. 43

<sup>311</sup>29 U.S.C. § 793(a).

<sup>312</sup>29 U.S.C. § 794.

<sup>313</sup>*Code*, § 43-6-15.

## Prohibited Conduct

Under Section 504, qualified individuals with disabilities cannot be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any activity or any executive agency.<sup>314</sup>

Municipalities performing federal contracts or subcontracts exceeding \$10,000 are required by § 503 to take affirmative action to employ and advance in employment qualified individuals with disabilities.<sup>315</sup>

An “individual with a disability” is defined as any person who: (1) has a physical or mental impairment which substantially limits a major life activity; (2) has a record of such impairment; or (3) is regarded as having such an impairment.<sup>316</sup>

An “individual with a disability” is also defined to exclude an individual who is currently engaging in the illegal use of drugs.<sup>317</sup> However, individuals who have successfully completed a supervised drug rehabilitation program or are participating in one and who are no longer engaging in the illegal use of drugs are protected.<sup>318</sup> Alcoholics whose use of alcohol prevents them from performing their duties or threatens the property and safety of others are also not considered to be disabled for purposes of the Act.<sup>319</sup>

The term “individual with a disability” further excludes an individual who has a currently contagious disease or infection which would constitute a direct threat to the health or safety of the individuals or others.<sup>320</sup>

Like the ADA, the Act also excludes homosexuality, transexuality, bi-sexuality, transvestism, pedophilia, exhibitionism, voyeurism, compulsive gambling, kleptomania, and pyromania as well.<sup>321</sup>

Courts construing the 1973 law have identified the following conditions as “disabilities”:  
blindness, impaired hearing, multiple sclerosis, diabetes, epilepsy, heart disease, dyslexia,

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<sup>314</sup>29 U.S.C. § 794.

<sup>315</sup>29 U.S.C. § 793(a).

<sup>316</sup>29 U.S.C. § 706(8)(B).

<sup>317</sup>29 U.S.C. § 706(8)(C)(I).

<sup>318</sup>29 U.S.C. § 706(8)(C)(ii).

<sup>319</sup>29 U.S.C. § 706(8)(D).

<sup>320</sup>29 U.S.C. § 706(8)(D).

<sup>321</sup>29 U.S.C. § 706(8)(E) and (F).

hypertension, hepatitis-B, lack of index finger on right hand, Huntington's Chorea, post traumatic stress disorder, Crohn's disease, alcohol and drug abuse recovery, achondroplastic dwarfism, tuberculosis, AIDS, manic depression, congenital back problems, and unusual sensitivity to smoke.

In addition, *Code*, § 43-6-15 provides that no person may be refused public employment "by reason of his being blind, visually handicapped, deaf or otherwise physically handicapped, unless such disability shall materially affect the performance of the work required by the job for which such person applies."<sup>322</sup>

### Procedure And Potential Liability

The Office of Federal Contract Compliance Programs (OFCCP) may conduct compliance reviews to determine if the contractor maintains non-discriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and that employees are placed, trained, upgraded, promoted, and otherwise treated in accordance with the terms of this act.<sup>323</sup>

A qualified individual with a disability who believes that a municipality has failed to comply with § 503 of the Rehabilitation Act may file a written complaint with the OFCCP within 300 days of the date of the alleged violation.<sup>324</sup> If after a prompt investigation, a material violation is discovered, the parties may be required to conciliate the matter. Where conciliation is not practical, the Department of Labor may begin enforcement proceedings against the contractor to enjoin the violations, to seek appropriate relief, and to impose appropriate sanctions. Appropriate sanctions include the following: withholding government progress payments, canceling or terminating the government contract, or the barring the contractor from future government contracts.<sup>325</sup>

A qualified individual with a disability who believes that a municipality has violated the provisions of § 504 of the Rehabilitation Act, may file a complaint in accordance with the procedures set forth in Title VII of the Civil Rights Act of 1964 and may avail himself of those remedies.<sup>326</sup>

In any action or proceeding brought under Section 503 or 504 of the Federal Rehabilitation Act, the court may award attorney fees to the prevailing party.

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<sup>322</sup>*Code*, §43-6-15.

<sup>323</sup>41 C.F.R. 60-741.63.

<sup>324</sup>41 C.F.R. Section 60-741.61(b).

<sup>325</sup>41 C.F.R. 60-741.65 and 41 C.F.R. 60-741.66.

<sup>326</sup>29 U.S.C. 749(a)(2).

## Consumer Credit Protection Act and the Bankruptcy Act Amendments of 1984

### Coverage

The Consumer Credit Protection Act<sup>327</sup> applies to all employees. The Bankruptcy Act Amendments of 1984<sup>328</sup> creates duties specifically for “governmental units.” The purpose of both laws is to protect the employment status of certain financially-pressed employees.

### Prohibited Conduct

The Consumer Credit Protection Act provides that “no employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness.”<sup>329</sup> The Bankruptcy Act amendments of 1984 further provides, with respect to every “governmental unit,” that the employing government agency may not

deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title or during the case, but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.<sup>330</sup>

### Liability Exposure

Willful violations of the Consumer Credit Protection Act are punishable by fines of not more than \$1,000.00, imprisonment for not more than one (1) year, or both.<sup>331</sup> This statute has been construed as an exclusive, criminal remedy and does not authorize a discharged private employee to institute a civil suit against his former employer.<sup>332</sup>

Under the Bankruptcy Code, a court has the discretion to fashion the appropriate remedy for a

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<sup>327</sup>15 U.S.C. 1671 *et seq.*

<sup>328</sup>11 U.S.C. 525 (a) and (b).

<sup>329</sup>15 U.S.C. Section 1671 *et seq.*

<sup>330</sup>11 U.S.C. §525(a).

<sup>331</sup>15 U.S.C. §1674 (b).

<sup>332</sup>*Smith v. Cotten Brothers Banking Company, Inc.*, 609 F.2d. 738 (5<sup>th</sup> Cir.), *cert denied* 449 U.S. 821 (1980).

violation of § 525, including injunctive relief, reinstatement of the employee, and in some cases monetary damages.<sup>333</sup>

## The Immigration Reform and Control Act

### Prohibitive Conduct

In 1986, Congress passed a law which makes it illegal to hire, to recruit, or refer for a fee any person known to be an unauthorized alien.<sup>334</sup> The law provides for the legalization of eligible aliens and prohibits discrimination against a U. S. citizen or permanent resident alien, refugee, asylee, or newly legalized alien who has filed a Notice of Intent to become a U. S. citizen. It is furthermore unlawful under the Act for a municipality to continue employment of an unauthorized alien after the municipality becomes aware of the unauthorized status.<sup>335</sup>

An “unauthorized alien” is an alien who is not at the time of employment either an alien lawfully admitted for permanent residence or authorized to be employed as such.<sup>336</sup>

### Procedure

The Act requires a municipality to verify all applicants for employment within three (3) days of hire. If an employee is to be employed for only three (3) days or less, the documentation must be presented on the first day of employment. Verification includes the establishment of *both* the individual’s employment authorization and identity. One of the following documents is sufficient to establish both criteria:

- (1) United States passport (unexpired or expired);
- (2) Certificate of United States citizenship, INS Form N-560 or N-561;
- (3) Certificate of Naturalization;
- (4) Unexpired foreign passport if the passport has the appropriate unexpired employment authorization stamp;
- (5) Alien registration receipt card, INS Form I-551;
- (6) An unexpired employment authorization document issued by the Immigration and Naturalization Service which contains a photograph, Form I-766; Form I-688,

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<sup>333</sup>*In re Hopkins*, 81 B.R. 491 (W.D. Ark. 1987).

<sup>334</sup>8 U.S.C. § 1324a(1).

<sup>335</sup>8 U.S.C. § 1324a(2).

<sup>336</sup>8 U.S.C. 1324a(h)(3).

Form I-688A or Form I-688B;

- (7) An unexpired reentry permit, INS Form I-327;
- (8) An unexpired refugee travel document, INS Form I-571.<sup>337</sup>

If the applicant does not have one of the above mentioned documents, he can show employment authorization and identity by a combination of other documents. An applicant can use one of the following documents to show that he is *authorized* for employment:

- (1) Social Security card, other than one specifying on its face that it does not authorize United States employment;
- (2) A certificate of birth abroad issued by the Department of State, Form FS-545;
- (3) A certificate of birth abroad issued by the Department of State, Form DS-1350;
- (4) An original or certified copy of a birth certificate issued by a state, county, municipal authority, or outlying possession of the United States bearing an official seal;
- (5) Native American travel document;
- (6) United States citizen identification card, INS Form I-197;
- (7) Identification card for use of resident citizen in the United States, INS Form I-179; and
- (8) An unexpired employment authorization document issues by the Immigration and Naturalization Service.<sup>338</sup>

An applicant who is 16 years of age and older can produce one of the following documents to prove *identity*:

- (1) A state issued driver's license or state-issued identification card containing a photograph or identifying information such as name, date of birth, sex, height, color of eyes, and address;
- (2) School identification card with a photograph;
- (3) Voter's registration card;

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<sup>337</sup>8 C.F.R. § 274a.2(b)(v).

<sup>338</sup>8 C.F.R. § 274a.2(c).

- (4) United States military card or draft record;
- (5) Identification card issued by federal, state, or local government agencies or entities containing a photograph or identifying information such as name, date of birth, sex, height, color of eyes, and address;
- (6) Military dependent's identification card;
- (7) Native American travel documents;
- (8) United States Coast Guard Merchant Mariner card; and
- (9) Driver's license issued by a Canadian government authority.<sup>339</sup>

If an applicant under the age of 18 is unable to produce one of the above documents, then one of the following documents is acceptable to establish *identity* only:

- (1) School record or report card;
- (2) Clinic, doctor, or hospital record;
- (3) Day care or nursery school record.

After the employer has established employment authorization and identity, the employer must sign an affidavit that he has reviewed these documents and that the documents reasonably appear to be genuine. The applicant must also sign an affidavit that he is a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is authorized by the Act or the Attorney General to be hired, recruited or referred for employment.<sup>340</sup> The municipality may fulfill these obligations by preparing an I-9 Form issued by the Immigration and Naturalization Service.

#### Penalties

The Act establishes penalties for first, second, third employer offenses and "pattern or practice violations, ranging from \$250.00 to \$10,000.00 for each alien involved to six (6) months imprisonment and/or a \$3,000.00 fine."<sup>341</sup>

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<sup>339</sup>8 C.F.R. § 274a.2(b)(v)(B)(1).

<sup>340</sup>8 U.S.C. § 1324a(b)(2).

<sup>341</sup>8 U.S.C. § 1324a(e)(4)(f).

## Consolidated Omnibus Budget Reconciliation Act

### Coverage

Congress enacted the Consolidated Omnibus Budget Reconciliation Act, better known as COBRA, in 1986.<sup>342</sup> COBRA covers all employers who employed 20 or more employees on a typical business day during the preceding calendar year. COBRA applies to all health plans after July 1, 1986.<sup>343</sup>

### Requirements

COBRA requires employers to extend health care coverage to a qualified beneficiary who would otherwise lose coverage under the plan as a result of a qualifying event. A qualified beneficiary includes any individual who, on the day before a qualifying event, is considered as (1) a covered employee, (2) the spouse of a covered employee, or (3) the dependent child of the covered employee.<sup>344</sup>

A qualifying event is considered one of the following:

- (1) Death of a covered employee;
- (2) Termination other than for gross misconduct<sup>345</sup> or reduction in hours;
- (3) Divorce or legal separation of the covered employee from the employee's spouse;
- (4) The employee becoming entitled to Medicare benefits; or
- (5) A child ceases to be dependent.

If the qualifying event was termination of employment or reduction of hours, the maximum period of COBRA continuation coverage is 18 months. If another qualifying event occurs within the 18-month period, the employer must extend coverage for up to 36 months.<sup>346</sup> In the event of the death of the employee, divorce, or legal separation, continuation coverage is available for a maximum period of 36 months to the spouse and children of the covered employee.

Employees and covered dependents who have obtained a determination from the Social Security

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<sup>342</sup>29 U.S.C. §1161-1168.

<sup>343</sup>29 U.S.C. §1161(b).

<sup>344</sup>29 U.S.C. §1167(3).

<sup>345</sup>Termination of employment includes voluntary termination.

<sup>346</sup>29 U.S.C. §1162(2)(A)(ii).

Administration that a disability existed as of the date of the qualifying event are entitled to coverage for an additional 11 months for a total of 29 months of continuation coverage.<sup>347</sup>

The period of extended coverage will cease on the date any of the following events occur:

- (1) The employer ceases to provide any group health plan to any employee;
- (2) Coverage ceases under the plan by reason of a failure to make a timely payment of any premium required under the plan;
- (3) The qualified beneficiary is covered by another group health plan (as an employee or otherwise) unless the new group health plan fails to cover pre-existing conditions;
- (4) The qualified beneficiary or employee becomes entitled to Medicare benefits; or
- (5) The beneficiary remarries and becomes covered under a group health plan by reason of being the spouse of a covered beneficiary.

#### Procedure

An employer can charge up to 102% of the applicable premium for the extended health care coverage.<sup>348</sup> An employer can charge up to 150% of the applicable premium for disabled employees who opt for the 29-month coverage.<sup>349</sup> An employee or beneficiary may elect, however, to make this a monthly, quarterly, or semi-annual payment rather than a lump sum payment.<sup>350</sup> Should the qualified beneficiary miss a monthly payment, the employee may have a 30-day grace period in which to pay before the coverage terminates or longer if the group health plan permits.<sup>351</sup> The applicable premium is the cost of the plan for similarly situated beneficiaries, with respect to whom a qualifying event has not occurred. The applicable premium is computed without regard to whether the cost is paid by the employer or the employee.<sup>352</sup>

The employer must notify the plan administrator within 30 days of the following qualifying events:

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<sup>347</sup>29 U.S.C. §1162(2)(A).

<sup>348</sup>29 U.S.C. §1162(3)(A).

<sup>349</sup>29 U.S.C. §1162(3).

<sup>350</sup>29 U.S.C. §1162(3)(B).

<sup>351</sup>29 U.S.C. §1162(2)(C).

<sup>352</sup>29 U.S.C. §1164.

- (1) Death of a covered employee;
- (2) Termination;
- (3) Reduction in hours resulting in loss of coverage; or
- (4) Entitlement to Medicare benefits.

For all other qualifying events, the employee or beneficiary must notify the plan administrator within 60 days of the occurrence.<sup>353</sup>

The plan administrator is responsible for notifying all qualified beneficiaries within 14 days after the occurrence of a qualifying event of the beneficiary's entitlement to extended coverage. Notification to an individual who was a qualified beneficiary as the spouse of the covered employee will be treated as notification to all other qualified beneficiaries residing with the spouse at the time notification is made.<sup>354</sup>

An employee has 60 days from the date on which coverage terminates due to the occurrence of a qualifying event to elect to continue health care coverage. A qualified beneficiary has 60 days from the date he receives notice from the plan administrator in which to elect to continue his health care coverage.<sup>355</sup> If a spouse of a covered employee elects continued coverage, his election, unless specifically stated otherwise, is sufficient to elect continued coverage for the children of the spouse and the covered employee.

#### Liability Exposure

Should the employer not provide the option of extended health care coverage under the health plan, the employer will not be allowed to deduct all the ordinary and necessary expenses of group health plans on its income tax returns.<sup>356</sup> The Act also provides for a minimum fine of \$15,000.00 where the employer's conduct is more culpable. In no event shall the fine for the employer exceed \$500,000.00. Since COBRA also refers to the Employee Retirement Income Security Act (ERISA), an employer that violates COBRA may be found liable for money damages and possibly attorneys fees under ERISA.<sup>357</sup>

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<sup>353</sup>29 U.S.C. §1166(a).

<sup>354</sup>29 U.S.C. §1166(c).

<sup>355</sup>29 U.S.C. §1165(1).

<sup>356</sup>26 U.S.C. §162.

<sup>357</sup>29 U.S.C. §1451.

## Executive Order No. 11246

### Coverage and Requirements

Executive Order No. 11246 creates affirmative action duties for municipalities who have major federal contracts and subcontracts.<sup>358</sup> Those municipalities having federal contracts totaling less than \$10,000.00 in any twelve-month period are generally exempt,<sup>359</sup> but those that have 50 or more employees and contracts for \$50,000.00 or more in any twelve-month period must develop written affirmative action programs for hiring and promoting minorities and females.<sup>360</sup>

In preparing a written affirmative action program, an employer must divide its workforce into “job groups” and must identify those in which minorities or females are “underutilized” in relation to the number of suitable candidates “available.” This detailed process results in setting numerical “goals” and “timetables” for hiring and promoting minorities and females into jobs in which they are “under-utilized.”<sup>361</sup>

Covered contractors and subcontractors must also include an equal employment opportunity clause in their federal contracts. This clause lasts as long as the contract and requires that the contractor (1) not to discriminate on the basis of race, color, religion, sex, or national origin against any employee or applicant; (2) state in all solicitations for employees that applicants will be considered without regard to race, color, religion, sex, or national origin; (3) notify the employees’ union about its affirmative action obligations; and (4) include the equal employment opportunity clause in all subcontracts or purchase orders.<sup>362</sup>

### Procedure

The Office of Federal Contract Compliance Programs (OFCCP) enforces obligations through random compliance reviews and investigations of individual complaints. If the complaint is filed

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<sup>358</sup>Certain federally assisted programs and businesses are also covered. *See* 41 C.F.R. §60-1.1.

<sup>359</sup>41 C.F.R. § 60-1.5. Such contractors will have affirmative action duties with respect to certain veterans and disabled persons.

<sup>360</sup>41 C.F.R. §60-2.1.

<sup>361</sup>The future of affirmative action programs is uncertain as the courts have begun to question whether such programs are violative of the Equal Protection clause. *See Adarand Constructors, Inc., v. Pena*, U.S. S.Ct. 200A (1995) (all federal affirmative action programs show a compelling government interest to survive equal protection challenges) *Hopwood v. Texas*, 78 F.3d 932 (5<sup>th</sup> Cir.), *cert denied*, 116 S.Ct. 2581 (1996) (non-remedial racial preferences in college admissions violates the equal protection guarantee of the Fourteenth Amendment); and *Taxman v. Board of Education*, 91 F.3d 1547 (3d. Cir. 1996) (non-remedial affirmative action plans do not pass constitutional muster).

<sup>362</sup>Executive Order No. 11246, 42 U.S.C. § 2000e, app., at 19; 41 C.F.R. §60-1.4.

within 180 days of the alleged discriminatory act, it is usually referred to the EEOC, but if the OFCCP investigates and finds a violation, it will attempt first to resolve the matter informally, then begin administrative enforcement proceedings to force compliance. The OFCCP may also refer the complaint to the Department of Justice which may bring a lawsuit to enforce the contract's provisions.<sup>363</sup>

The OFCCP begins each compliance review with a notice to the contractor requesting information, including the current affirmative action plan. All information must be submitted within thirty (30) days for a "desk audit." Failure to submit a plan or supporting data may be considered a major violation. When the OFCCP finds a violation of affirmative action obligations, it asks the contractor to show why it should not begin formal compliance proceedings. If, in the next thirty (30) days, the contractor fails to "show cause" for the failure to comply, the OFCCP may begin administrative enforcement proceedings against the contractor as defendant.<sup>364</sup> After an appropriate time for discovery and negotiations, a hearing may be held before an administrative law judge.<sup>365</sup> The administrative law judge will propose findings and conclusions for the Secretary of Labor's issuance of a final administrative order.<sup>366</sup>

### Liability

The Secretary of Labor may publish the name of a noncomplying contractor and may cancel, terminate or suspend the contractor's contract in whole or in part. The contractor may also be debarred or, if he has provided false information to any contracting agency or the Secretary of Labor, subjected to criminal prosecution. Finally, a noncomplying contractor whose violation of the Order is treated as a violation of Title VII may be liable for all remedies available through Title VII.<sup>367</sup>

### 42 U.S.C. Section 1981

### Coverage

Section 1981 was originally enacted as § 1 of the Civil Rights Act of 1866, pursuant to the congressional power provided by the Thirteenth Amendment to eradicate slavery. The statute covers all municipalities.<sup>368</sup>

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<sup>363</sup>41 C.F.R. §60-1-.26.

<sup>364</sup>41 C.F.R. §60-1.28 and 41 C.F.R. §60-30.5.

<sup>365</sup>41 C.F.R. §60-30.14.

<sup>366</sup>41 C.F.R. §60-30.27 and 41 C.F.R. §60-30.30.

<sup>367</sup>Executive Order No. 11246, 42 U.S.C. § 2000(e) app. at 21-22. *See also* discussion of Title VII *supra*.

<sup>368</sup>*Jones v. Alfred H. Mayer Company*, 392 U.S. 409 (1968).

## Prohibited Conduct

42 U.S.C. § 1981 forbids racial discrimination only in the “making and enforcing” of contracts. Unlike Title VII, it does not impose liability for conduct by the municipality after any contractual relation has been established, such as actions for breach of contract or imposition of discriminatory working conditions.<sup>369</sup> Although the focus of § 1981 is on racial discrimination, the statute has been applied to discrimination on the basis of alienage and national origin.<sup>370</sup>

A plaintiff must establish purposeful discrimination to succeed under 42 U.S.C. § 1981.<sup>371</sup> Thus, unlike Title VII of the Civil Rights Act of 1974, actions for disparate impact<sup>372</sup> cannot be brought under § 1981.<sup>373</sup> When § 1981 is used as a parallel basis for relief with Title VII against disparate treatment in employment, the elements of proof required of the plaintiff are identical to those required under Title VII.<sup>374</sup>

## Procedure

The federal district courts have jurisdiction over suits based on 42 U.S.C. § 1981.<sup>375</sup> Generally, the applicable statute of limitations in § 1981 actions has been construed to be Mississippi’s one-year limitations period governing unwritten contracts of employment,<sup>376</sup> or failure to employ,<sup>377</sup>

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<sup>369</sup>*Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989).

<sup>370</sup>*Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (9187); *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5<sup>th</sup> Cir.), *rehg. denied*, 503 F.2d 567 (5<sup>th</sup> Cir. 1974).

<sup>371</sup>*Grigsby v. North Mississippi Medical Center, Inc.*, 586 F.2d 457, 460-61 (5<sup>th</sup> Cir. 1978); *Williams v. DeKalb County*, 582 F.2d 2 (5<sup>th</sup> Cir. 1978).

<sup>372</sup>*See* discussion of disparate impact and disparate treatment under Title VII beginning on page VI-107.

<sup>373</sup>*Washington v. Davis*, 426 U.S. 229, 238-39 (1976).

<sup>374</sup>*Whiting v. Jackson State University*, 616 F.2d 116, 121 (5<sup>th</sup> Cir. ), *rehg. denied*, 622 F.2d 1043 (5<sup>th</sup> Cir. 1980).

<sup>375</sup>28 U.S.C. §§ 1331 and 1343.

<sup>376</sup>*Code*, § 15-1-29; *see White v. United Parcel Service*, 692 F.2d 1 (5<sup>th</sup> Cir. 1982). In *Owens v. Okure*, 109 S. Ct. 573 (1989), the United States Supreme Court held that the residual statute of limitations applies to § 1983 actions. At least one district court has found this reasoning to apply to § 1981 cases. *See Kozam v. Emerson Elec. Co.*, 711 F. Supp. 313 (N.D. Miss. 1989). The Fifth Circuit has not yet determined the issue.

<sup>377</sup>*Code*, § 15-1-35.

but Mississippi's "catch-all" statute of limitations has also been applied.<sup>378</sup>

### Liability Exposure

A prevailing plaintiff in a § 1981 action is entitled both to equitable and/or legal relief, including compensatory damages,<sup>379</sup> against the municipality. Punitive damages may not be awarded against a municipality.<sup>380</sup> If a party seeks legal relief such as compensatory damages, he is entitled to a jury trial with respect to the legal issues. He is not entitled to a jury trial with respect to any equitable relief requested.

Available equitable relief includes back pay and reinstatement.<sup>381</sup> Unlike Title VII, a back pay award under § 1981 is not limited to two (2) years. A successful plaintiff is also entitled to an award of costs, including attorneys' fees.<sup>382</sup> Exposure is substantially increased if the plaintiff sues in a class action on behalf of himself and all others who have suffered similar discrimination.

### 42 U.S.C. Section 1983

#### Coverage

Section 1983 was originally enacted as § 1 of the Civil Rights Act of 1871, also known as the Ku Klux Klan Act.<sup>383</sup> Section 1983 only applies to persons acting "under color of" state law.<sup>384</sup> Generally speaking, § 1983 applies to all acts of municipalities unless the municipality's involvement through licensing, regulation, expenditure of public funds, location in publicly

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<sup>378</sup>*Code*, § 15-1-49; *Truvillion v. King's Daughters Hospital* 614 F.2d 520 (5<sup>th</sup> Cir. 1980), *rehg denied*, 618 F.2d 781 (5<sup>th</sup> Cir. 1980).

<sup>379</sup>*Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

<sup>380</sup>*Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

<sup>381</sup>*See* Liability Exposure section under Title VII.

<sup>382</sup>42 U.S.C. § 1988.

<sup>383</sup>Act of April 20, 1871, Ch. 22 § 1, 17 Stat. 13.

<sup>384</sup>*Blum v. Yaretsky*, 457 U.S. 991 (1982); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Mizell v. North Broward Hosp. Dist.*, 427 F.2d 468 (5<sup>th</sup> Cir. 1970). For examples of cases in which state action was found, *see, Augustine v. Doe*, 740 F.2d 322 (5<sup>th</sup> Cir. 1984) (police brutality); *Layne v. Sampley*, 627 F.2d. 12 (6<sup>th</sup> Cir. 1980) (police brutality by off-duty police officers). For examples of cases in which state action was not found, *see, Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (private non-profit school was not acting under color of state law even though it performed a public function); *Bonsignore v. New York*, 683 F.2d 635 (2<sup>nd</sup> Cir. 1982) (off-duty shooting by police officer who shot his wife).

owned facilities, the nature of the functions exercised, public image, or some other combination of these factors demonstrates municipal involvement in private areas.<sup>385</sup>

Under the statutory language, a municipality is a “person” which can be sued directly under § 1983 for monetary, declaratory or injunctive relief where “the action that is alleged to be unconstitutional implements or executes a policy, statement, ordinance, regulation or decision officially adopted and promulgated by that body’s officers.”<sup>386</sup> Public policy also includes custom and usage.<sup>387</sup> The Fifth Circuit has defined official policy as follows:

- (1) A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality’s lawmaking officers or by an official who has policy-making authority; or
- (2) A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. In such a case, it must be shown that the municipality either knew or should have known of the custom.<sup>388</sup>

#### Prohibited Conduct

Section 1983 is a remedial statute providing a cause of action for deprivation of any rights secured by the *United States Constitution* and laws.<sup>389</sup> Section 1983, therefore, protects only a deprivation of a federal right and is the vehicle by which suits for violations of these rights are brought.<sup>390</sup> Thus, suits for violations of the First,<sup>391</sup> Fourth,<sup>392</sup> and Fourteenth Amendments<sup>393</sup> are brought as § 1983 actions. However, the Supreme Court has not been clear as to what rights arising under federal statutes are protected by § 1983. In determining whether a statutory right is

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<sup>385</sup>*Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Mizell v. North Broward Hosp. Dist.*, 427 F.2d 468 (5<sup>th</sup> Cir. 1970).

<sup>386</sup>*Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).

<sup>387</sup>*City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988).

<sup>388</sup>*Bennett v. City of Slidell*, 728 F.2d 762, 765 (5<sup>th</sup> Cir. 1984).

<sup>389</sup>*Sugarman v. Dougall*, 413 U.S. 634 (1973); *In re Griffiths*, 413 U.S. 717 (1973).

<sup>390</sup>*Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

<sup>391</sup>See section below for a discussion of the First Amendment.

<sup>392</sup>See section below for a discussion of the Fourth Amendment.

<sup>393</sup>See section below for a discussion of the Fourteenth Amendment.

protected by § 1983, courts will consider whether the relevant statutes:

- (1) demonstrates congressional intent not to foreclose § 1983 remedies; and
- (2) creates “rights, privileges, or immunities.”<sup>394</sup>

### Procedure

The federal district courts have jurisdiction suits based on § 1983 without regard to the amount in controversy.<sup>395</sup> No federal administrative remedies are available. A plaintiff is not required to exhaust any state or local administrative remedies that may exist before filing a § 1983 action.<sup>396</sup>

The United States Supreme Court has determined that the statute of limitations most appropriate for § 1983 claims is Mississippi’s residual limitations period provided by *Code*, §15-1-49.<sup>397</sup> Therefore, a § 1983 suit must be brought within six (6) years of the date the plaintiff knew or should have known of the alleged wrongful act forming the basis of the suit.

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<sup>394</sup>*Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981).

For examples of cases in which the court found rights created by federal statutes to be protected by § 1983, *see*, *Victorian v. Miller*, 813 F.2d 718 (5<sup>th</sup> Cir. 1987) (Food Stamp Act, 7 U.S.C. § 2011); *Keaukaha-Panewa Community v. Hawaiian Homes Comm.*, 739 F.2d 1467 (9<sup>th</sup> Cir. 1984) (The Hawaiian Admission Act, 73 Stat. 4 (1959)); *Lynch v. Dukakis*, 719 F.2d 504, 512 (1<sup>st</sup> Cir. 1983) (AFDC program, 42 U.S.C. § 601 *et seq.*; *Crawford v. Janklow*, 710 F.2d 1321 (8<sup>th</sup> Cir. 1983) (The Low Income Home Energy Assistance Act, 42 U.S.C. § 8624 (b)); *Holly v. Housing Authority of New Orleans*, 684 U.S.C. § 1437(c)(3); *Members of the Bridgeport v. Bridgeport*, 564 F. Supp. 2, 6 (D.C. Conn. 1982) (Model Cities Act, 42 U.S.C. § 3301 *et seq.*). *Consortium of Community Based Organizations v. Donovan*, 530 F. Supp. 520 (E.D. Ca. 1982), (CETA, 29 U.S.C. § 801 *et seq.*).

For examples of cases in which the court found rights created by federal statutes were not protected by § 1983, *See*, *Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199 (6<sup>th</sup> Cir. 1984) (Title VII, 42 U.S.C. § 2000e); *McGuinness v. U.S. Postal Service*, 744 F.2d 1318, 1322 (7<sup>th</sup> Cir. 1984) (Rehabilitation Act of 1973, 29 U.S.C. § 794; *Allegheny Co. Sanitary Authority v. U.S.E.P.A.*, 29 U.S.C. § 794; *Allegheny Co. Sanitary Authority v. U.S.E.P.A.*, 732 F.2d 1167 (3<sup>rd</sup> Cir. 1984) (Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*); *Dept. of Educ., State of Hawaii v. Katherine D.*, 727 F.2d 809, 820 (9<sup>th</sup> Cir. 1983) (Education of All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.*).

<sup>395</sup>28 U.S.C. § 1343; 28 U.S.C. § 1331.

<sup>396</sup>*Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982).

<sup>397</sup>*Owens v. Okure*, 109 S. Ct. 573 (1989).

## Liability Exposure

A prevailing plaintiff in a § 1983 action may be entitled to an award of compensatory damages against the municipality and its officials both in their official and individual capacities.<sup>398</sup>

Generally, punitive damages may be awarded in appropriate circumstances against public officials,<sup>399</sup> but punitive damages may not be awarded against a municipality.<sup>400</sup>

Municipal officials are entitled to assert a qualified immunity in defense of their actions.<sup>401</sup>

Officials performing discretionary functions are shielded from liability for civil damages “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known.”<sup>402</sup> Officials are not expected to anticipate subsequent legal developments, but if the law is clearly established, an official’s immunity defense ordinarily should fail, since a competent municipal official is expected to know the law governing his conduct.<sup>403</sup> The official has the burden of pleading and proving qualified immunity.<sup>404</sup> The municipality is not entitled to any form of immunity, even where its officials have successfully asserted their qualified immunity.<sup>405</sup>

All parties have a right to a jury trial on the issue of liability for compensatory and punitive damages.<sup>406</sup> Parties are not entitled to a jury trial with respect to equitable relief such as reinstatement and back pay.<sup>407</sup> A prevailing plaintiff is entitled to an award of costs, including attorneys’ fees.<sup>408</sup> Liability is increased if the plaintiff sues on behalf of himself and all others who have suffered a similar deprivation of rights.

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<sup>398</sup>*Carey v. Phipps*, 435 U.S. 247 (1978).

<sup>399</sup>*Id.*

<sup>400</sup>*Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

<sup>401</sup>*Wood v. Strickland*, 420 U.S. 308 (1975).

<sup>402</sup>*Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

<sup>403</sup>*Id.*

<sup>404</sup>*Gomez v. Toledo*, 446 U.S. 635 (1980); *but see Hander v. San Jacinto Junior College*, 519 F.2d 273 (5<sup>th</sup> Cir. 1975).

<sup>405</sup>*Owen v. City of Independence*, 445 U.S. 622 (1980).

<sup>406</sup>*Curtis v. Loether*, 415 U.S. 189 (1974).

<sup>407</sup>*Harkless v. Sweeney Ind. School Dist.*, 427 F.2d 319 (5<sup>th</sup> Cir. 1970), *cert den.* 400 U.S. 991 (1971).

<sup>408</sup>42 U.S.C. § 1988.

## First Amendment

### Coverage

The First Amendment to the *United States Constitution* was proposed to the legislatures of the states by the First Congress on September 25, 1789 and ratified on December 15, 1791. Although the First Amendment proscribes federal action, it is applicable to the states and their political subdivisions through the Fourteenth Amendment.<sup>409</sup> Thus, it applies to all municipalities.

### Prohibited Conduct

The First Amendment to the *United States Constitution* provides the following:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment restricts the municipality's endorsement or disapproval of religion,<sup>410</sup> its ability to discharge an employee for political affiliations,<sup>411</sup> its ability to discharge an employee for exercising freedom of speech,<sup>412</sup> and its regulation of citizens' rights to use a public forum when expressing their views.<sup>413</sup>

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<sup>409</sup>*Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

<sup>410</sup>*Lynch v. Donnelly*, 465 U.S. 668 (1984) (use of nativity scene did not violate the First Amendment when the municipality had a secular purpose); *McCreary v. Stone*, 739 F.2d 716 (2<sup>nd</sup> Cir. 1984), *aff'd*, 471 U.S. 83 (1985) (per curiam) (municipality's neutral accommodation of nativity scene did not violate First Amendment); *Anderson v. Salt Lake City, Utah*, 475 F.2d 29 (10<sup>th</sup> Cir.), *cert. denied*, 414 U.S. 879 (1973) (erection of monolith on which Ten Commandments were inscribed did not violate First Amendment where it was shown that purpose was secular).

<sup>411</sup>*Branti v. Finkel*, 445 U.S. 507 (1980) (First Amendment protects a public employee from being discharged solely because of his political beliefs); *Elrod v. Burns*, 427 U.S. 347 (1976) (same).

<sup>412</sup>*Connick v. Myers*, 461 U.S. 138 (1983); *Davis v. West Comm. Hospital*, 755 F.2d 455 (5<sup>th</sup> Cir. 1985); *Jones v. Dodson*, 727 F.2d 1329 (4<sup>th</sup> Cir. 1984).

<sup>413</sup>*Heffron v. Intl. Soc. for Krishna Consc.*, 452 U.S. 640 (1981) (upholding requirements that the distribution of literature be at an assigned place); *Consolidated Edison Co. v. Public Serv. Comm.*, 447 U.S. 520 (1980) (invalidating a public service commission's order barring utilities from including inserts discussing controversial public policy issues in billing envelopes); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (invalidating a licensing requirement for parades because the ordinance did not have narrow, objective and definitive standards to guide the licensing authority).

## Procedure

First Amendment rights may be enforced through a suit under 42 U.S.C. § 1983.<sup>414</sup> In cases challenging an ordinance or the failure of a municipality to grant a license, the courts will balance the interest of the person in asserting his constitutional rights against the interest of the municipality in preventing riots, disorder, interference with traffic upon the public streets, or immediate threats to public safety, peace, or order.<sup>415</sup>

In the employment context, courts will balance the interest of the employees in asserting their constitutional rights against the interest of the municipality in promoting the efficiency of public services that it provides. Ordinarily, the court applies a three-part test. First, it must determine whether such activity or speech is constitutionally protected.<sup>416</sup> In determining whether the activity is protected, the court will balance the interest of the employee as a citizen exercising First Amendment rights and the interest of the services rendered. Second, the court must determine whether the activity in question constituted a “motivating factor” for the employee’s termination.<sup>417</sup> Third, if the speech or activity is constitutionally protected, the court must ascertain whether the employee would have been fired even in the absence of such speech or activity.<sup>418</sup>

An employee’s First Amendment rights include both public<sup>419</sup> and private<sup>420</sup> criticism of his employer. It encompasses freedom of association, including the employee’s right to join and participate in a labor organization.<sup>421</sup> It also covers employee and third party rights to solicit orally and distribute literature on municipal premises.<sup>422</sup>

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<sup>414</sup>See section above for a discussion of § 1983.

<sup>415</sup>*Cantwell v. Connecticut*, 310 U.S. 296 (1940).

<sup>416</sup>*Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

<sup>417</sup>*Id.*

<sup>418</sup>*Carey v. Phipps*, 435 U.S. 247 (1978).

<sup>419</sup>*Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

<sup>420</sup>*Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410 (1979).

<sup>421</sup>*Vicksburg Fire Assn., Local 1680 Intl. Assn. of Firefighters, AFL-CIO v. City of Vicksburg*, 761 F.2d 1036 (5<sup>th</sup> Cir. 1985); *American Federation of State, County and Municipal Employees v. Woodard*, 406 F.2d 137 (8<sup>th</sup> Cir. 1969).

<sup>422</sup>*Dallas Assn. of Community Organizations for Reform Now v. Dallas County Hosp. Dist.*, 670 F.2d 629 (5<sup>th</sup> Cir. 1982).

## Liability Exposure

A prevailing plaintiff can recover for actual damages caused, including special damages in the form of out-of-pocket losses and general damages such as emotional distress.<sup>423</sup> In the area of employment, a plaintiff prevailing on a First Amendment claim may be entitled to an award of compensatory damages against the municipality and its officials, both in their official and individual capacities.<sup>424</sup> Such a plaintiff may also be entitled to back pay and reinstatement. Punitive damages may be awarded in appropriate circumstances against municipal officials,<sup>425</sup> but punitive damages may not be awarded against the municipality.<sup>426</sup>

## Fourth Amendment

### Coverage

The Fourth Amendment was proposed to the legislatures of the States by the First Congress on September 25, 1789, and was ratified on December 15, 1791. Although the Fourth Amendment prohibits federal action, it is applicable to the states and their political subdivisions through the Fourteenth Amendment. Thus, it applies to all municipalities.

### Prohibited Conduct

The Fourth Amendment to the *United States Constitution* provides the following:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no Warrant shall issue, but upon probable cause, supported by oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The applicability of the Fourth Amendment's protection is determined by whether a public employee had a reasonable, subjective expectation of privacy in the area or activity "searched."<sup>427</sup>

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<sup>423</sup>*Williams v. Bd. of Regents*, 629 F.2d 993, 1005 (5<sup>th</sup> Cir. 1980); *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977); *Donovan v. Reinbold*, 433 F.2d 738 (9<sup>th</sup> Cir. 1970).

<sup>424</sup>*Carey v. Phiphus*, 435 U.S. 247 (1978).

<sup>425</sup>*Id.*

<sup>426</sup>*Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

<sup>427</sup>*O'Connor v. Ortega*, 480 U.S. 709 (1987); *United States v. Sanders*, 568 F.2d 1175 (5<sup>th</sup> Cir. 1978) (per curiam); *United States v. Bunkers*, 521 F.2d 1217, 1219 (9<sup>th</sup> Cir.), cert. denied, 423 U.S. 989 (1975).

A regulation placing employees on notice of the employers' right to search their lockers or desks renders the Fourth Amendment inapplicable.<sup>428</sup> In the absence of notice, courts have recognized that employees have a reasonable expectation of privacy in their lockers,<sup>429</sup> offices<sup>430</sup> or their body.<sup>431</sup> Once the employee shows that he had a reasonable expectation of privacy in the place searched or the object seized, courts will balance the employee's interests with the needs of the employer.<sup>432</sup>

Thus, if a municipality can show a need to search a locker for drugs or to take urine for a drug analysis that overrides the employee's reasonable expectation of privacy, it will not violate the Fourth Amendment.<sup>433</sup> Courts have held that a city's need to prevent its bus drivers from driving while under the influence of drugs or alcohol may override the driver's expectation of privacy,<sup>434</sup> and a city's need to protect the public from policemen under the influence may override the policeman's expectation of privacy.<sup>435</sup> Even in situations where the employer's interest would override the employee's interest, courts still do not favor random testing or searches.<sup>436</sup> Therefore, before the municipality undertakes a search or test, it should have reasonable suspicion to suspect that the employee is abusing drugs or alcohol.

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<sup>428</sup>*United States v. Speights*, 557 F.2d 362, 365 (3<sup>rd</sup> Cir. 1977).

<sup>429</sup>*Gillard v. Schmidt*, 579 F.2d 825 (3<sup>rd</sup> Cir. 1978) (holding search of employee's desk and locker violated Fourth Amendment); *United States v. Speights*, 557 F.2d 362 (3<sup>rd</sup> Cir. 1977) (holding public employer's search of employee's locker violated Fourth Amendment).

<sup>430</sup>*Ortega v. O'Connor*, 764 F.2d 703 (9<sup>th</sup> Cir. 1985) (holding that search of employee's office violated Fourth Amendment), *revd. on other grounds*, 480 U.S. 709 (1987).

<sup>431</sup>*Compare Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986) (September 30, 1986) (urinalysis testing violated Fourth Amendment rights absent a reasonable, individualized suspicion that an employee was using drugs) *and Turner v. Fraternal Order of Police*, 500 F.2d 1005 (D.C. Ct. App. 1985) (urinalysis testing of police officers did not violate Fourth Amendment) *with Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985) (holding that urinalysis testing did not violate Fourth Amendment since they were not conducted as part of a criminal investigation).

<sup>432</sup>*Camara v. Municipal Court*, 387 U.S. 523 (1967).

<sup>433</sup>*Skinner v. Ry. Labor Executives' Assn.*, 489 U.S. 602, 109 S. Ct. 1402, 103 L.Ed.2d 639 (1989); *Natl. Treasury Employees Union v. Von Raah*, 489 U.S. 656, 109 S. Ct. 1384, 103 L.Ed.2d 685 (1989); *Natl. Federation of Federal Employees v. Cheney U*, 884 F.2d 603 (D.C. Cir. 1989).

<sup>434</sup>*New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979); *Div. 241 Amalgamated Transit Union (AFL-CIO) v. Suscy*, 538 F.2d 1264 (7<sup>th</sup> Cir. 1976).

<sup>435</sup>*Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. Ct. App. 1985).

<sup>436</sup>*Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986).

There are also a number of particular rules and regulations applying to drug and alcohol testing of municipal employees, the *Constitution* allows testing when there is individualized suspicion of drug use. Further, the Supreme Court has determined that mandatory testing *without* individualized suspicion is constitutionally permissible for employee involved in the interdiction of illegal drugs; law enforcement personnel who carry firearms; certain employees working on gas and hazardous liquid pipelines;<sup>437</sup> and employees who operate commercial motor vehicles in interstate or intrastate commerce and are subject to the commercial driver's license requirements.<sup>438</sup>

Depending on the nature of the municipal employee's work, specific federal regulations may require pre-employment drug-testing and testing following any on-the-job accident. Random testing may also be required. There are also federally mandated reporting and record-keeping requirements for drug and alcohol testing.

State law requires that at least 30 days prior to implementation of any drug or alcohol testing program, a written policy be furnished to affected employees.<sup>439</sup> The policy must identify the circumstances under which testing can be required, describe the actions that can be taken against an employee for a positive test, and contain a statement advising the employee of laws concerning confidentiality and procedures for confidentially reporting the use of prescription or nonprescription medications prior to testing. The law contains as exception for employers who have any employees subject to federal regulations governing the administration of drug and alcohol tests.

It is important to remember that all pre-employment and random drug and alcohol testing is subject to the restrictions of the *United States Constitution* as discussed above.

#### Procedure

Fourth Amendment rights may be enforced through a § 1983 action.<sup>440</sup>

#### Liability Exposure

Violation of a public employee's Fourth Amendment rights give rise to liability by the municipality and its officials under 42 U.S.C. § 1983.<sup>441</sup>

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<sup>437</sup>49 C.F.R. Part 199

<sup>438</sup>49 C.F.R. Part 383.

<sup>439</sup>*Code*, §§ 71-7-1, et seq.

<sup>440</sup>See section above for a discussion of § 1983.

<sup>441</sup>See section above for a discussion of § 1983.

## Fourteenth Amendment

### Coverage

The Fourteenth Amendment to the *United States Constitution* was proposed to the legislatures of the States on June 13, 1866, and became a part of the *Constitution* in 1868. The Fourteenth Amendment's restrictions apply to all municipalities.<sup>442</sup>

### Prohibited Conduct

The Fourteenth Amendment to the *United States Constitution* provides in part the following:

*Section 1 . . .* No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The due process provisions of the Fourteenth Amendment, standing alone and without incorporation of other aspects of the Bill of Rights, have both procedural and substantive aspects. Before due process rights are implicated, a constitutionally-protected life, liberty, or property interest must be identified.<sup>443</sup> Once this interest is identified, procedural due process concerns are raised. These involve the kinds of notice and hearing required to permit a municipality to deprive an employee of such an interest. Substantive due process issues concern whether the actions of the municipality in taking away certain life, liberty, or property interests were permissible

The Fourteenth Amendment gives rise to four distinct types of legal rights: (1) equal protection of law; (2) liberty; (3) property; and (4) life. The Fourteenth Amendment's equal protection clause has been used to invalidate segregation of public school systems,<sup>444</sup> ordinances that regulate interracial marriages,<sup>445</sup> requirements that a political candidate's race appear on the ballot,<sup>446</sup> and laws that impose alimony obligations on husbands and not wives.<sup>447</sup> Recently, school districts have begun a trend toward neighborhood schools for elementary school children.

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<sup>442</sup>*Virginia v. Rieves*, 100 U.S. 313 (1879).

<sup>443</sup>*See, e.g., Paul v. Davis*, 424 U.S. 693 (1976), in which the Supreme Court held that an interest solely in reputation is not protected by the due process clause.

<sup>444</sup>*Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan.*, 347 U.S. 483 (1954).

<sup>445</sup>*Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>446</sup>*Anderson v. Martin*, 375 U.S. 399 (1964).

<sup>447</sup>*Orr v. Orr*, 440 U.S. 268 (1979).

These plans have withstood Fourteenth Amendment scrutiny in limited circumstances.<sup>448</sup> In an employment context, the equal protection provision prohibits a municipality from discriminating against employees or applicants for employment on the basis of their race or other forms of individual discrimination.<sup>449</sup>

The Fourteen Amendment also forbids a municipality from depriving a person of his “liberty” without due process of law. A person’s “liberty” is infringed when a municipality does something to damage his good name, honor, or integrity,<sup>450</sup> however, a person’s interest in his reputation alone is not recognized as a constitutionally-protected liberty interest.<sup>451</sup> For example, a municipality could not post a notice naming persons to whom the sale of liquor is forbidden because of their prior excessive drinking without first giving those persons notice and an opportunity to be heard.<sup>452</sup> The posting of the notice would impose a “stigma” on the person, so his liberty interest would be implicated.

Public employees may enjoy a “liberty” interest in their employment. If an employer makes a charge against an employee relating to discipline “that might seriously damage [the employee’s] standing and associations in his community” or that is of such a nature as to impose “a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities,” the employee has a right to a due process hearing.<sup>453</sup> However, in order for a liberty interest to arise, (1) the charges must be made public, and (2) the employee must dispute them.<sup>454</sup> The hearing must afford the employee an opportunity to refute the charge and clear his name.<sup>455</sup>

The due process provisions of the Fourteenth Amendment also apply to the taking of a person’s “property” without due process of law. If an employee has a legitimate claim of entitlement to public employment under state law, he enjoys a “property interest” in his job.<sup>456</sup> If state law does

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<sup>448</sup>See *Riddick v. School Bd. of City of Norfolk*, 784 F.2d 521, 535 (4<sup>th</sup> Cir. 1986); *Edwards v. Greenville Mun. School Dist.*, Civil Action No. 70-8-LS (N.D. Miss. 1986).

<sup>449</sup>*Washington v. Davis*, 426 U.S. 229 (1976).

<sup>450</sup>*Wisconsin v. Constantineau*, 400 U.S. 433 (1970).

<sup>451</sup>*Paul v. Davis*, 424 U.S. 693 (1976).

<sup>452</sup>*Wisconsin v. Constantineau*, 400 U.S. 433 (1970).

<sup>453</sup>*The Bd. of Regents of State College v. Roth*, 408 U.S. 564, 573 (1972).

<sup>454</sup>*Codd v. Velger*, 429 U.S. 624 (1977); *Rosenstain v. City of Dallas*, 876 F.2d 392 (5<sup>th</sup> Cir. 1989).

<sup>455</sup>408 U.S. at 573, n.12.

<sup>456</sup>*Roth*, 408 U.S. at 577.

not provide an employee with a “claim of entitlement” to his job, the prevailing rule in Mississippi is that employees are terminable at will, so that an employee may be discharged for good cause, bad cause or no cause at all.<sup>457</sup> However, if state law restricts termination to “for cause” reasons or if certain employees are otherwise “tenured” or have “civil service protection,” these public employees enjoy a property interest.<sup>458</sup>

A public employer can inadvertently create a protected property interest in employment through statements in its employee handbook, an employment contract, or other “mutually explicit understandings that support a claim of entitlement.”<sup>459</sup> An employment handbook must be read in its entirety “to glean the expectations of the parties.”<sup>460</sup> If the employer’s statements create a reasonable expectation of continued employment, a court may find these employees enjoy a property interest in their employment.<sup>461</sup>

Before an employee may be deprived of any property interest in employment, the employee is entitled to a “meaningful” hearing concerning any disciplinary action the employer desires to take.<sup>462</sup> An employee who has a constitutionally protected interest in his employment must be given a hearing prior to discharge.<sup>463</sup> A full evidentiary hearing with transcript, attorneys, and witnesses may be required.<sup>464</sup> However, the Supreme Court has noted that “the existence of post-termination procedures is relevant to the necessary scope of pre-termination procedures.”<sup>465</sup> Immediate termination of public employees enjoying property rights should be limited to “extraordinary situations” where the individual’s continued employment would have a direct

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<sup>457</sup>*White v. Mississippi Oil & Gas Board*, 650 F.2d 540 (5<sup>th</sup> Cir. 1981); *Green v. Amerada-Hess Corp.*, 612 F.2d 212 (5<sup>th</sup> Cir.), *cert. denied*, 449 U.S. 953 (1980); *Kelly v. Mississippi Valley Gas Company*, 397 So.2d 874 (Miss. 1981).

<sup>458</sup>*Sartin v. City of Columbus Utilities Commission*, 421 F. Supp. 393, 396 (N.D. Miss. 1976); *aff’d mem.* 573 F.2d 84 (5<sup>th</sup> Cir. 1978).

<sup>459</sup>*Bishop v. Wood*, 426 U.S. 341, 344 N.6 (1976); *Conley v. Board of Trustees of Grenada Cty. Hosp.*, 707 F.2d 175 (5<sup>th</sup> Cir.), *rehg denied*, 716 F.2d 901 (1983).

<sup>460</sup>*United Steelworkers v. University of Alabama*, 599 F.2d 56, 60 (5<sup>th</sup> Cir. 1979).

<sup>461</sup>*Glenn v. Newman*, 614 F.2d 467, 471 (5<sup>th</sup> Cir. 1980).

<sup>462</sup>*Winkler v. County of DeKalb*, 648 F.2d 411, 414 (5<sup>th</sup> Cir. 1981).

<sup>463</sup>*Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

<sup>464</sup>*Ferguson v. Thompson*, 430 F.2d 852, 856 (5<sup>th</sup> Cir. 1970).

<sup>465</sup>*Loudermill*, 470 U.S. at 547, n.12.

adverse impact upon public operations.<sup>466</sup>

#### Procedure

Fourteenth Amendment rights may be enforced through a 42 U.S.C. § 983 action.<sup>467</sup>

#### Liability Exposure

The liability of a municipality and its officials for violation of a person's Fourteenth Amendment rights is the same as in other actions brought under 42 U.S.C. § 1983.<sup>468</sup>

### MISSISSIPPI STATUTES

#### Mississippi Unemployment Compensation Law

#### Procedure

A claim for unemployment benefits is initiated by an employee who files a written form stating the reason for separation. The employer is then notified of the claim and given an opportunity to respond.<sup>469</sup> An employer should respond with his reason for terminating the claimant because all successful claims are charged against the employer's unemployment compensation tax rate.

After the claim is filed and the employer responds, the claim is referred to a claims examiner for an initial determination of the merits of the claim. Either party may appeal the decision of the claims examiner within fourteen (14) after notification of the decision.<sup>470</sup> Appeals from the claims examiner are heard by an Appeal Tribunal.<sup>471</sup> Both parties are allowed to have an attorney present at this hearing. In addition, both parties are allowed to subpoena and present witnesses at the hearing.

Either party may appeal the Tribunal's decision within fourteen (14) days of notification of the decision.<sup>472</sup> Appeal is taken to the Board of Review, which can make a decision based on the

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<sup>466</sup>*Thurston v. Dekle*, 531 F.2d 1264, 1273 (5<sup>th</sup> Cir. 1976), *judgment vacated on other grounds*, 437 U.S. 901 (1978).

<sup>467</sup>See section above for a discussion of § 1983.

<sup>468</sup>See section above for a discussion of § 1983.

<sup>469</sup>*Code*, § 71-5-515.

<sup>470</sup>*Id.*

<sup>471</sup>*Code*, § 71-5-519.

<sup>472</sup>*Id.*

existing record, remand to the Appeal Tribunal for further investigation, or have the parties appear and argue their cases.<sup>473</sup> The decision of the Board of Review is final ten (10) days after the parties are notified of the decision.<sup>474</sup> The losing party then has ten (10) additional days to appeal to a circuit court having jurisdiction. Appeals from the circuit court go to the Mississippi Supreme Court.<sup>475</sup>

### Employer Contributions

Municipalities are required either to keep a revolving fund,<sup>476</sup> make contributions to the unemployment fund,<sup>477</sup> or reimburse the state's unemployment fund.<sup>478</sup> If it elects to keep a revolving fund, the municipality must maintain this fund at no less than two percent (2%) of the covered wages paid during the next preceding year.<sup>479</sup> If it elects to make contributions, the contributions must equal two percent (2%) of wages paid by it during each calendar quarter.<sup>480</sup>

If the municipality becomes delinquent in payments, notice will be given to the municipality and the Mississippi Employment Security Commission shall issue a certification of delinquency to the Department of Finance and Administration, the State Tax Commission, the Department of Environmental Quality and the Department of Insurance, or any of them. Such agencies will then issue a warrant for the amount of delinquency payable to the Mississippi Employment Security Commission and draw upon any funds in the State Treasury which may be available to the municipality.<sup>481</sup>

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<sup>473</sup> *Code*, § 71-5-525.

<sup>474</sup> *Code*, § 71-5-529.

<sup>475</sup> *Code*, § 71-5-531.

<sup>476</sup> A revolving fund is established by depositing monthly for twenty-four (24) months an amount equal to one-twelfth (1/12) of one percent (1%) of the first \$6,000.00 paid to each employee during the next preceding year plus an amount each month equal to one-third (1/3) of any reimbursement paid to the Employment Security Commission for the next preceding quarter. *Code*, § 71-5-359(2)(f).

<sup>477</sup> *Code*, § 71-5-359(2)(j).

<sup>478</sup> *Code*, § 71-5-359(2)(e).

<sup>479</sup> *Code*, § 71-5-359(2)(f).

<sup>480</sup> *Code*, § 71-5-359(2)(j).

<sup>481</sup> *Code*, § 71-5-359(2)(g).

## Disqualification for Benefits

An employee is disqualified for benefits if he leaves work voluntarily without good cause.<sup>482</sup> The burden is on the employee to show that the required conditions have been met entitling him to benefits.<sup>483</sup>

An employee is also disqualified for benefits if discharged for misconduct connected with his work.<sup>484</sup> However, “[m]ere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity, or inadvertence and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion are not considered ‘misconduct’ within the meaning of the statute.”<sup>485</sup>

Benefits will also be denied if a claimant is unemployed due to a work stoppage which exists because of a labor dispute. However, if the work stoppage was caused by an unjustified lockout or the claimant is not participating in or directly interested in the labor dispute which caused the work stoppage, and the claimant does not belong to a grade or class of workers of which, immediately before the commencement of stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or directly interested in the dispute, unemployment benefits will be granted.<sup>486</sup>

## Mississippi’s Child Support and Wage Garnishment Laws

### Coverage

In 1985, the Mississippi Legislature amended the Enforcement of Support of Dependents Act, to cover employers.<sup>487</sup> The Act covers all municipalities regardless of the number of persons they employ.

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<sup>482</sup>Code, § 71-5-513(A)(1)(a).

<sup>483</sup>Code, § 71-5-513(A)(1)(c); *see also Sunbelt Ford-Mercury, Inc. v. Mississippi Employment Security Commission*, 552 So.2d 117, 120 (Miss. 1989).

<sup>484</sup>Code, § 71-5-513(A)(1)(b).

<sup>485</sup>*Mississippi Employment Security Commission v. Harris*, 672 So.2d 739, 742 (Miss. 1996).

<sup>486</sup>Code, § 71-5-513(A)(4).

<sup>487</sup>Code, § 93-11-101, *et seq.*

## Requirements and Prohibited Conduct

Mississippi law requires municipalities to withhold employee wages upon receipt of a court order for child support, and to keep records and transmit payments to the Mississippi Department of Public Welfare. The municipality is also prohibited from discriminating against the employee because of the municipality's duty to withhold income.<sup>488</sup>

### Procedure

The municipality is not required to make any deductions for the first fourteen (14) days but should begin withholding the amount specified in the order on the first pay day following the fourteen-day period.<sup>489</sup> The municipality should also withhold an amount specified by the Mississippi Department of Public Welfare not to exceed \$5.00 which is forwarded to the Mississippi Department of Public Welfare to help defray administrative costs.<sup>490</sup> The municipality is also entitled to withhold and receive an additional \$2.00 to defray its administrative costs related to the garnishment.<sup>491</sup> The withholding order takes priority over any other garnishment or claims of creditors.<sup>492</sup>

### Penalties

Should the municipality fail to withhold the payments, the court can order the municipality to make the payment out of the municipal treasury.<sup>493</sup> The municipality may also be subject to a \$50.00 fine for discriminating against an individual because of the municipality's obligation to withhold.<sup>494</sup>

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<sup>488</sup> *Code*, § 93-11-111(9).

<sup>489</sup> *Code*, § 93-11-111(1).

<sup>490</sup> *Code*, § 93-11-111(3).

<sup>491</sup> *Code*, § 93-11-111(2)

<sup>492</sup> *Code*, § 93-11-111(7).

<sup>493</sup> *Code*, § 93-11-117(1).

<sup>494</sup> *Code*, § 93-11-117(2).

## Workers' Compensation

### Coverage

In 1942, the Mississippi Legislature enacted the Mississippi Workmen's (Workers') Compensation Law which applies to all employers employing more than five (5) persons on any particular workday.<sup>495</sup> As of October 1, 1990, municipalities were required to participate in the program.<sup>496</sup>

### Requirements

An employee sustaining an injury or occupational disease arising out of and during the course of his employment is entitled to compensation without regard to fault as to the cause of the injury or occupational disease.<sup>497</sup> The amount of disability compensation to which the employee is entitled is determined by a chart outlined in *Code*, § 71-3-17. The amount of compensation to which a dependant is entitled due to death of an employee is determined by a chart outlined in *Code*, § 71-3-25. The total amount of compensation paid cannot exceed \$121,803.00 exclusive of medical payments.<sup>498</sup>

### Procedure

The employee must notify the employer within thirty (30) days of the occurrence of the injury.<sup>499</sup> Failure to give notice will not, however, bar the employee from recovering if the employee can show that the employer had knowledge of the injury and the employer was not prejudiced by the lack of notice.<sup>500</sup> The first installment is due on the fourteenth (14<sup>th</sup>) day following notice, and each subsequent installment shall be made semi-monthly.<sup>501</sup>

Should the employee not receive payment or should the employer dispute the right to compensation, either may file a petition to controvert with the Commission.<sup>502</sup> The Commission can determine all questions relating to the payment of claims for compensation. It may also

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<sup>495</sup>*Code*, § 71-3-5.

<sup>496</sup>*Id.*

<sup>497</sup>*Code*, § 71-3-7.

<sup>498</sup>*Code*, § 71-3-13.

<sup>499</sup>*Code*, § 71-3-35(1).

<sup>500</sup>*Id.*

<sup>501</sup>*Code*, § 71-3-37.

<sup>502</sup>*Id.*

conduct an investigation and a hearing.<sup>503</sup> The losing party may appeal to a circuit court of the county in which the injury occurred within thirty (30) days of the Commission's determination.<sup>504</sup> The losing party in the circuit court may then appeal to the Mississippi Supreme Court.<sup>505</sup>

### Liability

Any municipality that fails to make payments under the Worker's Compensation Law is subject to a criminal fine of not more than \$1,000.00 and municipal officials may be subject to imprisonment of not more than one (1) year, or both.<sup>506</sup> The municipality may also be subject to a civil penalty as determined by the Commission not to exceed \$10,000.00.<sup>507</sup>

### Anti-Strike Law

#### Procedure

After the teachers' strike in 1985, the Mississippi Legislature passed two statutes which prohibit teachers<sup>508</sup> and public employees<sup>509</sup> from striking. Municipal employees are subject to these provisions if they are paid in whole or in part by state funds.<sup>510</sup>

#### Prohibited Conduct

The Anti-Strike Law makes it illegal for one (1) or more certified teachers or a teacher organization to "promote, encourage, or participate in any strike against a public school district, the State of Mississippi or any agency thereof." Thus, teachers and/or public employees are prohibited from:

- (1) All concerted failures to report to work;

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<sup>503</sup>*Code*, § 71-3-47.

<sup>504</sup>*Code*, § 71-3-51.

<sup>505</sup>*Id.*

<sup>506</sup>*Code*, § 71-3-83.

<sup>507</sup>*Id.*

<sup>508</sup>*Code*, § 37-9-75.

<sup>509</sup>*Code*, § 25-1-105. This statute declares that all provisions of § 37-9-75 are applicable to public employees in the State of Mississippi.

<sup>510</sup>*Id.*

- (2) Willful absences from work;
- (3) Stoppages of work;
- (4) Deliberate slowing down of work;
- (5) Withholding the full faithful and proper performance of their duties for the purposes of inducing, influencing, or coercing a change in working conditions, compensation, rights, privileges, or obligations; and
- (6) Promoting, encouraging, or participating in an illegal strike.<sup>511</sup>

The statute also makes it unlawful for a school board or any person exercising authority to “close or curtail the operations of the public school, or to change or alter in any manner the schedule of operations of said school in order to circumvent the full force and effect” of the statute.<sup>512</sup> In addition to this prohibition, school officials and/or city officials are required to:

- (1) Continue school operations as long as practicable during a strike and ascertain and certify the names of striking teachers to the Attorney General;
- (2) File suit to enjoin illegal strikes in which teachers, groups of teachers, or teacher organizations become involved within an official’s district; and
- (3) Seek a temporary injunction prior to the actual commencement of a strike when there is a “clear, real and present danger” that such a strike is about to commence.<sup>513</sup>

The statute is silent as to whether local officials have the right to enter into collective bargaining with local unions and ultimately to enter into collective bargaining agreements. Thus, it appears that home rule<sup>514</sup> would allow local governmental entities to negotiate with a public employee union.

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<sup>511</sup>Code, § 37-9-75(1)(3).

<sup>512</sup>Code, § 37-9-75(4).

<sup>513</sup>Code, § 37-9-75(4)(6).

<sup>514</sup>See Code, § 21-17-5 (Supp. 1996) which gives municipalities the authority to do anything that is not inconsistent with the *Mississippi Constitution* or any status or law in the State of Mississippi.

## Procedure

Teachers or public employees who are suspected of violating this statute are entitled to a hearing in Chancery Court.<sup>515</sup> Suits under this section should be filed in the Chancery Court of the First Judicial District of Hinds County or in the county where the illegal strike takes place and the striking teachers can be found.<sup>516</sup>

## Penalties

A teacher or public employee found to have promoted, encouraged, or participated in an illegal strike will be barred from public employment by any district in Mississippi.<sup>517</sup> Teacher organizations that violate the statute are subject to a fine of up to \$20,000.00 for each day the violation continues.<sup>518</sup> Officers, agents or representatives of teacher organizations may also be personally liable for any damages to a school district caused by the organization's illegal actions.<sup>519</sup>

## Wrongful Discharge

### Coverage

Generally, Mississippi has followed the doctrine that an employment arrangement for an indefinite term involving only services and compensation is terminable at the will of either party, at any time, for any reason, good or bad, or for no reason at all.<sup>520</sup> However, the Mississippi Supreme Court modified the "at-will" employment doctrine in 1993 by identifying the following two (2) limited circumstances for which an "at-will" employee could not be terminated without potential employer liability: (1) the employee refuses to participate in an illegal act; or (2) the employee reports illegal acts of his employer to his employer or anyone else.<sup>521</sup>

### Prohibited conduct

In *McArn*, the Mississippi Supreme Court stated that there should be public policy exceptions to the employment-at-will doctrine for employees who refuse to participate in an illegal act or who

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<sup>515</sup>*Code*, § 37-9-75(5).

<sup>516</sup>*Code*, § 37-9-75(6) and *Code*, § 11-5-1.

<sup>517</sup>*Code*, § 37-9-75(8).

<sup>518</sup>*Code*, § 37-9-75(7).

<sup>519</sup>*Id.*

<sup>520</sup>*Kelly v. Mississippi Valley Gas Co.*, 397 So.2d 874 (Miss. 1981).

<sup>521</sup>*McArn v. Allied Bruce-Terminix Co., Inc.*, 626 So.2d 603 (Miss. 1993).

reports illegal acts of his employer. In this case, the employee sued his employer for wrongful discharge alleging he was terminated for refusing to commit deceptive, fraudulent or illegal actions against the clients of the pest control business, or for reporting same. The Mississippi Supreme Court has recently taken *McArn* one step further finding that an employer's conduct in discharging an employee in retaliation for refusing to participate in an illegal act or for reporting illegal acts of the employer, is an independent tort giving rise to punitive damages.<sup>522</sup>

Several other states recognize exceptions to the at-will doctrine. These exceptions can be divided into two broad categories: the public policy exception and the implied contract exception.

The public policy exception to the at-will doctrine generally encompasses cases in which an employee is terminated for refusing to commit an illegal act or for exercising a statutory right. For example, exceptions to the at-will doctrine have been found where an employee refused his employer's request to perjure himself,<sup>523</sup> refused to participate in illegal activity,<sup>524</sup> filed a worker's compensation claim,<sup>525</sup> or refused to submit to sexual advances.<sup>526</sup>

Under the implied contract exception, the employer, through a company representative,<sup>527</sup> personnel manual,<sup>528</sup> or other policy statement,<sup>529</sup> creates an implied-contract which prevents the

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<sup>522</sup>*Willard v. Paracelsus Health Care Corp.*, 681 So.2d 539 (Miss. 1996).

<sup>523</sup>*Petermann v. Int'l Brotherhood of Teamsters*, 174 Cal.App.2d 184, 344 P.2d 25 (1959); *Schultheiss v. Mobil Oil Exploration and Producing Southeast, Inc.*, 592 F.Supp. 628 (W.D. La. 1984); *Merkel v. Scovill, Inc.*, 570 F.Supp. 133, 140 (S.D. Ohio 1983); *Montalvo v. Zamora*, 7 Cal.App.3d 69, 86 Cal.Rptr. 401 (1970).

<sup>524</sup>*Perry v. Hartz Mountain Corp.*, 537 F.Supp. 1387 (S.D. Ind. 1982); *Harless v. First Natl. Bank of Fairmont*, 246 S.E.2d 270 (W.Va. 1978).

<sup>525</sup>*See, e.g., Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353 (1978); *Sweat v. Peabody Coal Co.*, 94 F.3d 301 (7<sup>th</sup> Cir. 1996); *Murphy v. City of Topeka-Shawnee County Dept. of Labor Servs.*, 6 Kan.App.2d 489, 630 P.2d 186 (1981); *Sventko v. Kroger Co.*, 69 Mich.App. 644, 245 N.W.2d 151 (1976); *Martin v. Tapley*, 360 So.2d 708 (Ala. 1978).

<sup>526</sup>*Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (8<sup>th</sup> Cir. 1984) (applying Arkansas law); *Priest v. Rotary*, 40 FEP Cases 208 (N.D. Cal. 1986) (applying California law).

<sup>527</sup>*Green v. City of Hamilton, Housing Authority*, 937 F.2d 1561 (11<sup>th</sup> Cir. 1991); *Murphree v. Alabama Farm Bureau Ins. Co.*, 449 So.2d 1218 (Ala. 1984).

<sup>528</sup>*See, e.g., Green v. City of Hamilton, Housing Authority*, 937 F.2d 1561 (11<sup>th</sup> Cir. 1991); *Wagenseller v. Scottsdale Memorial Hospital*, 147 Ariz. 370, 710 P.2d 1025 (1985).

<sup>529</sup>*See e.g., Rulon-Miller v. International Business Machines Corp.*, 162 Cal.App.3d 241, 208 Cal.Rptr. 524 (1984).

employee from being discharged except for just cause. The Mississippi Supreme Court has held that a college faculty handbook was a part of the teachers' employment contracts and therefore, the college was bound by the terms of the handbook.<sup>530</sup> However, this case is not considered a true exception to the at-will doctrine because the Court's holding was predicated on the college's use and dissemination of the handbook to all teachers and the fact that the teachers' contracts bound them to follow the handbook rules.<sup>531</sup>

Recently, the Mississippi Supreme Court took another look at the employment-at-will doctrine holding that an employer had contracted with its employee through statements contained in its employee handbook even though the handbook included language disclaiming an express or implied contract of employment, and the handbook was not distributed to the employee until five months after she began her employment.<sup>532</sup>

A public employer's handbook has also been held to create a property interest<sup>533</sup> in continued employment thereby destroying an at-will employment relationship.<sup>534</sup> In this case, a county hospital was empowered by the Legislature to adopt whatever rules it deemed necessary to operate the hospital. Pursuant to this authority, the hospital adopted a detailed handbook which stated that employees could be terminated for 36 specifically listed violations. The court held that this provision, when read in the context of other handbook provisions, guaranteed that employees would not be terminated absent violation of one of these specific reasons. This was held to be analogous to a "just cause" standard which created a property interest in continued employment.<sup>535</sup>

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<sup>530</sup>*Robinson v. Board of Trustees of East Central Jr. College*, 477 So.2d 1352 (Miss. 1985); see also *Bobbitt v. The Orchard, Ltd.*, 603 So.2d 356 (Miss. 1992) (holding that employee manual distributed to all employees became a part of implied employment contract); but see *Watkins v. United Parcel Service, Inc.*, 797 F.Supp. 1349 (S.D. Miss. 1992) (holding that employer's policy book did not create express or implied written contract of employment where the policies listed within the manual were couched in terms of ideals and goals).

<sup>531</sup>*Id.* At 1352-53.

<sup>532</sup>*Southwest Mississippi Regional Medical Center v. Lawrence*, 684 So.2d 1257 (Miss. 1996).

<sup>533</sup>See section above for more discussion of "property interests."

<sup>534</sup>*Conley v. Board of Trustees of Grenada County Hospital*, 707 F.2d 175 (5<sup>th</sup> Cir.), *reh'g. denied*, 716 F.2d 901 (1983).

<sup>535</sup>*Id.* At 180-81; But see *Johnson v. Southwest Regional Medical Center*, 878 F.2d 856 (5<sup>th</sup> Cir. 1989) (holding that public hospital's employee handbook did not create property interest in continued employment under Alabama law where handbook clearly stated that nothing in it was to be considered a guarantee of continued benefits of employment and that employment was terminable for any reason).

## Procedure

An action for wrongful discharge may be filed in the Circuit Court of the county in which the discharge occurred.<sup>536</sup> An action for breach of a contractual obligation under an employee handbook may be filed either in the Chancery Court or the Circuit Court in which the discharge occurred.<sup>537</sup> The employer may also bring suit in federal district court under 42 U.S.C. § 1983 should the municipality deprive him of a property right under an employment contract without due process of law.<sup>538</sup>

## Liability

A municipality that is found to have wrongfully discharged an employee may be held liable for actual damages such as back pay, accrued pension, or pain and suffering.<sup>539</sup> The municipality may also be required to reinstate the employee. Punitive damages may be awarded in appropriate circumstances against the public officials<sup>540</sup> but not against a municipality.<sup>541</sup> A municipality that is found to have deprived an employee of a property interest without due process of law is subject to liability under 42 U.S.C. § 1983.<sup>542</sup>

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<sup>536</sup>*Code*, § 9-7-81.

<sup>537</sup>*Code*, § 9-5-81.

<sup>538</sup>*See* section above for more discussion of § 1983.

<sup>539</sup>*Compare, Priest v. Rotary*, 40 FEP Cases 208 (N.D. Cal. 1986) (applying California law).

<sup>540</sup>*Carey v. Phipps*, 435 U.S. 247 (1978).

<sup>541</sup>*Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); *Davis v. West Community Hospital*, 755 F.2d 455 (5<sup>th</sup> Cir. 1985).

<sup>542</sup>*See* discussion of 42 U.S.C. § 1983, above.

