FEDERAL
QUICK AND EASY GUIDE TO LABOR & EMPLOYMENT LAW

PROVIDED BY BAKER DONELSON

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Which of These Laws Apply to My Business?

Employment Law	Citation	Number of Employees
Federal		
Americans with Disabilities Act (ADA)	42 U.S.C. 12101 et seq.	15 or more
Title VII of the Civil Rights Act of 1964	42 U.S.C. 2000e et seq.	15 or more
Uniformed Services Employment and Reemployment Rights Act	38 U.S.C. 4301 et seq.	1 or more
Fair Labor Standards Act (FLSA)	29 U.S.C. 201 et seq.	1 or more
Occupational Safety and Health Act	29 U.S.C. § 651 et seq.	1 or more
Family and Medical Leave Act (FMLA)	29 U.S.C. 2601 et seq.	50 or more
Age Discrimination in Employment Act (ADEA)	29 U.S.C. 621 et seq.	20 or more
Pregnancy Discrimination Act	42 U.S.C. 2000e(k) et seq.	15 or more
Genetic Information Nondiscrimination Act (GINA)	42 U.S.C. 2000ff et seq.	15 or more
Pregnant Workers Fairness Act	42 U.S.C. 2000gg et seq.	15 or more

Office of Federal Contract Compliance Programs Coverage

	Basic Threshold	AAP Threshold
Section 503 of the Rehabilitation Act (29 U.S.C. 793)	Total amount of all federal contracts or subcontracts more than $10,000	50 or more employees and a single federal contract or subcontract equal to or more than $50,000
Vietnam Era Veteran's Readjustment Assistance Act (38 U.S.C. 4212)		A contract or subcontract equal to or more than $100,000
For contracts entered into before December 1, 2003.	Federal contract or subcontract equal to or more than $25,000	50 or more employees and a single federal contract or subcontract equal to or more than $50,000
For contracts entered into after December 1, 2003.	Federal contract or subcontract of $100,000 or more	50 or more employees and a single federal contract or subcontract equal to or more than $100,000
Executive Order 11246 (41 C.F.R. 60-1 & 60-2)	Total amount of all federal contracts or subcontracts equal to or more than $10,000	50 or more employees and a single federal contract or subcontract equal to or more than $50,000

Discrimination

Both federal and state laws prohibit discrimination in employment decisions against people who are members of a "protected class." A protected class is a group of people who share common characteristics and are protected from discrimination and harassment. Under Title VII of the Civil Rights Act of 1964 (Title VII), legally protected classes include:

Age: Federal laws prohibit discrimination against individuals at least 40 years of age and older.

Race: Discrimination on the basis of immutable characteristics associated with race, such as skin color, hair texture, or certain facial features is prohibited.

Color: This type of discrimination occurs when individuals are treated differently than others who are similarly situated on the basis of lightness, darkness, or other color characteristics, such as skin shade or tone. Color discrimination can occur in the absence of race discrimination and between people of the same race or ethnicity.

Disability: Discrimination is prohibited against individuals with physical or mental impairments that substantially limit one or more major life activities, who have a record of such impairment, or who are regarded as having an impairment.

National Origin: National origin discrimination involves treating people (applicants or employees) unfavorably because they are from a particular country or part of the world, of ethnicity or accent, or they appear to be of a certain ethnic background (even if they are not). It can include harassment based on ethnic or cultural characteristics and linguistic characteristics, like lack of fluency in English.

Religion: The term "religion" includes all aspects of religious observance and practice, as well as belief. Protected religious practices include moral or ethical beliefs about what is right and wrong that are sincerely held with the strength of traditional religious views.

Sex: This class prohibits discrimination based on sex/gender and applies to both men and women. Employer rules or policies that apply only to one gender violate applicable law. This class also prohibits discrimination based on sexual orientation or transgender status and protects gender identity (i.e., how an employee identifies as male, female, or neither).

Pregnancy: Employers may not consider an employee's pregnancy when making employment decisions. Employers must treat pregnancy-related disabilities in a similar fashion to other disabilities that similarly affect an employee's ability to work (i.e. employers are required to provide pregnancy-related reasonable accommodations to employees or applicants absent an undue hardship).

Veteran Status: Any individual who has served, or is serving, in a branch of the U.S. Armed Forces, or the like may not be discriminated against.

Caregivers: Although federal law does not explicitly prohibit discrimination against caregivers, stereotyping or other forms of disparate treatment may constitute gender discrimination or discrimination based upon a worker's association with an individual with a disability. For example, employers may not treat female employees less favorably on the gender-based assumption that they will assume caretaking responsibilities or that their caretaking responsibilities will interfere with their work performance. Employers also may not treat an employee less favorably based on stereotypical assumptions about the worker's ability to perform job duties satisfactorily while also providing care to a relative or other individual with a disability. Employees who suffer from pregnancy-related disabilities are also entitled to reasonable accommodations under the ADA.

Genetic Information: Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about the manifestation of a disease or disorder in an individual's family members (i.e., family medical history). Discrimination on the basis of genetic information is illegal when it comes to any aspect of employment, including hiring, firing, pay, job assignments,

promotions, layoffs, training, fringe benefits, or any other term or condition of employment. Genetic information may also be a basis for illegal harassment.

Individual state laws or local ordinances may expand but cannot decrease the scope of protected classes under the law.

Workplace Harassment

Harassment is a common form of discrimination that violates Title VII of the Civil Rights Act of 1964 and other laws. This includes sexual harassment, but harassment based on race or other protected characteristics is also prohibited.

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment; unreasonably interferes with an individual's work performance; or creates an intimidating, hostile, or offensive work environment. Sexual harassment may occur in a variety of circumstances, including but not limited to:

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex;
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a coworker, or a nonemployee;
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct;
- Unlawful sexual harassment may occur without economic injury to, or discharge of the victim; and
- The harasser's conduct must be unwelcome.

Employers should take steps necessary to prevent illegal harassment from occurring, including the implementation of a comprehensive workplace harassment policy. They should clearly communicate to employees that sexual and other illegal harassment will not be tolerated. They can do so by providing harassment training to their employees, establishing an effective complaint or grievance process, and taking immediate and appropriate action when an employee complains.

Americans with Disabilities Act (ADA)

The Americans with Disabilities Act of 1990 (ADA), amended by the ADA Amendments Act of 2008 (Amendments), prohibits employers from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training and other terms, and conditions and privileges of employment. The ADA covers employers with 15 or more employees.

An "individual with a disability" is a person who:

- Has a physical or mental impairment that substantially limits one or more major life activities. Major life activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Major life activities also include "major bodily functions," which include functions of the immune system; normal cell growth; and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions;
- Has a record of such impairment; or
- Is regarded as having such an impairment. The "regarded as" standard is met if the individual can show that they have been subjected to a prohibited action, such as termination or failure to hire, because of an actual or perceived impairment, regardless of whether the impairment is perceived to substantially limit a major life activity.

The Amendments to the ADA provide that the definition of "disability" should be construed in favor of broad coverage to the maximum extent permitted and reject prior case law limiting this broad coverage. Moreover, the determination of whether an impairment substantially limits a major life activity "shall be made without

regard to the ameliorative effects of mitigating measures." For example, medication, prosthetics, and hearing aids used by an employee will not be considered in determining whether the employee's impairment substantially limits a major life activity. The one exception to this rule is the use of "ordinary eyeglasses or contact lenses," the ameliorative effects of which should be considered in assessing whether an impairment substantially limits a major life activity.

A qualified employee or applicant with a disability is an individual who can perform the essential functions of the job in question with or without reasonable accommodation. Reasonable accommodation may include, but is not limited to:

- Making existing facilities used by employees readily accessible to and usable by people with disabilities;
- Job restructuring, modifying work schedules, and/or reassignment to a vacant position; or
- Acquiring or modifying equipment or devices; adjusting or modifying examinations, training materials, or policies; and providing qualified readers or interpreters.

A job's essential functions include the fundamental duties of the position the disabled individual holds or desires but do not include marginal tasks of such a position. A function may be considered essential for several reasons, including, but not limited to:

- The reason the position exists is to perform that function;
- There are a limited number of employees who are qualified to perform such functions; or
- The function is highly specialized, and an individual is hired for their specific expertise in that role.

Evidence of an essential function includes but is not limited to: 1) the employer's judgment; 2) written job descriptions prepared before advertising the role or interviewing applicants; 3) the amount of time spent performing the function; or 4) the consequences of not requiring the employee to perform the function.

Under the ADA, an employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an undue hardship on the operation of the employer's business. Undue hardship is defined as "an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation."

An employer is not required to lower quality or production standards to make an accommodation, nor is an employer generally obligated to provide personal use items such as glasses or hearing aids.

Age Discrimination in Employment Act (ADEA)

The Age Discrimination in Employment Act of 1967 (ADEA) applies to employers with 20 or more employees, including state and local governments. It also applies to employment agencies and labor organizations, as well as the federal government.

The ADEA protects individuals who are 40 years of age or older from employment discrimination based on age. The ADEA's protections apply to both employees and job applicants. Under the ADEA, it is unlawful to discriminate against a person because of their age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training. It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on age or for filing an age discrimination charge or testifying or participating in any way in an investigation, proceeding, or litigation under the ADEA.

One of the most important amendments to the ADEA is the Older Workers Benefit Protection Act of 1990 (OWBPA). The OWBPA prevents employers from discriminating in benefits based on age or from requiring older workers to waive rights without including certain safeguards in their waivers. According to the OWBPA, a waiver of rights under the ADEA must generally meet these criteria:

1. Be knowing and voluntary;
2. Be part of a written, clearly understood agreement;
3. Refer specifically to ADEA rights or claims;
4. Not waive rights and claims that may arise in the future;
5. Provide for consideration (to which the employee is not already entitled);
6. Advise the individual in writing to consult an attorney;
7. Provide 21 days for an individual to consider the waiver (45 days if a group offer – group offers also require notice of positions and ages of employees not selected for severance);
8. Allow seven days to revoke the waiver.

A release of age claims is not enforceable unless it contains these requirements.

Fair Labor Standards Act (FLSA)

The Fair Labor Standards Act (FLSA) requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay for all hours worked more than 40 hours in a work week. Covered nonexempt employees are entitled to a minimum wage of $7.25 per hour, effective July 29, 2009.

Certain executive, administrative, professional, outside sales, and computer employees are exempted from these requirements. To qualify for an exemption, employees must be paid on a salary basis at not less than $844 per week, as of January 1, 2024, and the jobs they perform must meet certain criteria. The salary basis is increasing on January 1, 2025, to $1,128 per week ($58,646 annually).

Executive:

- The employee's primary duty must be in the management of the enterprise.
- The employee must regularly direct the work of at least two other full-time employees.
- The employee must have the authority or significant influence regarding the hiring, firing, or advancement of other employees.

Administrative:

- The employee's primary duty must be the performance of nonmanual work directly related to management or general business operations.
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Learned Professional:

- The employee's work requires advanced knowledge in a field of science or learning customarily acquired by a course of specialized intellectual instruction.
- The employee's work requires invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

Outside Sales:

- The employee's primary duty must be in making sales.
- The employee must be regularly engaged away from the employer's place of business.

Computer Professionals:

- The employee must be compensated on either a salary or fee basis at a rate of not less than $455 per week or, if hourly, at a rate of not less than $27.63 an hour.
- The employee must be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.

Working Time Under FLSA

The FLSA requires nonexempt employees in the United States to be paid at least the federal minimum wage for all hours worked and overtime pay for all hours worked more than 40 hours in a work week.

On-Call Time

Whether on-call time is compensable depends on whether such time predominantly benefits the employer, or the employee can use the time for their own purpose. If an employee can pursue personal activities during the on-call time, the time is unlikely to be considered compensable. In determining whether on-call time is compensable, courts will consider the following factors:

- Response time;
- Use of a pager to ease restrictions;
- Ability to trade on-call shifts;
- Excessive geographical limitations;
- Employees' ability to engage in personal activities; and
- Frequency of the calls.

Travel Time

Ordinary commuting time between home and work is not considered compensable time. However, employers must compensate employees who have a fixed work location and travel to one-day assignments. Overnight travel during an employee's regular working hours or their weekend equivalent is also compensable unless the employee is merely a passenger and does no work during the travel time.

"Donning" and "Doffing"

Time spent donning and doffing (putting on and taking off) gear that is "integral and indispensable" to an employee's work activity is a principal activity under the FLSA and is compensable. This often includes putting on and taking off clothing and equipment required by the employer or by federal or state regulation. Donning and doffing activities may be considered integral and indispensable if they enhance the employee's safety or primarily benefit the employer.

In addition, if donning and doffing activities are compensable, time spent traveling from the changing area to the actual workplace is also compensable. However, time spent donning and doffing customary and non-unique safety equipment that is easy to put on – such as a hard hat, goggles, or earplugs – is often considered to be *de minimis* and is generally not compensable.

Equal Pay Act (EPA)

The EPA amends the FLSA and prohibits wage discrimination based on sex. An EPA claim simply compares the wages paid to members of one sex with the wages paid to members of another sex. Thus, the EPA requires that male and female employees be paid equal wages for equal work in the same establishment. Equal work means work that is equal in skill, effort, and responsibility. For comparative purposes under the EPA, the comparator and plaintiff must perform their jobs under similar working conditions. Similar working condition factors include surroundings, such as toxic chemicals and fumes encountered on the job, and physical hazards and the frequency with which they are encountered on the job. All employers that are covered by the FLSA (those with a minimum of 1 employee) are covered by the EPA.

PUMP Act

The PUMP for Nursing Mothers Act (PUMP Act) requires that covered employers provide reasonable break time to employees needing to express breast milk for a nursing child. For one year after the child's birth, covered employees may take reasonable break time "each time such employee has need to express the milk." An employer may not deny a covered employee a needed break to pump. The frequency and duration of breaks needed to express milk will depend on factors related to the nursing employee and the child. Under the FLSA, a bathroom, even if private, is not a permissible location for the employer to provide for pumping breast milk; it must be a "place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public."

Pregnant Workers Fairness Act

The Pregnant Workers Fairness Act (PFWA) went into effect on June 27, 2023, and requires covered employers to provide "reasonable accommodations" to a worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an "undue hardship." "Covered employers" are those with 15 or more employees. The PFWA does not replace federal, state, or local laws that are more protective of workers affected by pregnancy, childbirth, or related conditions.

USERRA

The Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits discrimination because of "service in the uniformed services" and requires prompt reemployment of uniformed service members to their civilian jobs upon return from duty. Service in the uniformed services means the performance of duty on a voluntary or involuntary basis, including:

- Active duty;
- Training;
- Full-time National Guard duty;
- Absence from work for an examination to determine fitness for duty;
- Funeral honors duty; and
- National Disaster Medical System.

The uniformed services consist of:

- Army, Navy, Marine Corps, Air Force, or Coast Guard, and their Reserve components;
- Army and Air National Guard; and
- Commissioned Corps of the Public Health Service.

The law requires employees or an appropriate officer of the uniformed service in which the employee's service is to be performed to provide their employers with advance notice of military service unless giving such notice is prevented by military necessity or is otherwise impossible or unreasonable under the circumstances.

Reemployed service members are entitled to the seniority and all rights and benefits that they would have attained with reasonable certainty had they remained continuously employed.

Service members must, at their request, be permitted to use any vacation that had accrued before the beginning of their military service instead of unpaid leave. Service members are not entitled to use sick leave that had accrued during military service unless the employer allows employees to use sick leave for any reason or allows other similarly situated employees on leave of absence to use accrued paid sick leave.

Reporting Back Requirements

For periods of service of less than 31 consecutive days, the person must report back to work for the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and safe transportation home, plus an eight-hour period for rest.

After a period of service of 31 to 180 days, the employee must submit a written or verbal application for reemployment with the employer not later than 14 days after the completion of the period of service.

After a period of service of 181 days or more, the person must submit an application for reemployment not later than 90 days after completion of the period of service.

Exceptions may be made where these reporting requirements are impossible or unreasonable.

Five-Year Limit

USERRA sets a five-year cumulative limit on the amount of military service an employee can perform and still retain reemployment rights with a given employer. There are numerous exceptions for certain types of service that do not count against USERRA's five-year service limit.

The Family and Medical Leave Act of 1993 (FMLA)

The Family and Medical Leave Act of 1993 (FMLA) entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons.

Employer Coverage

The FMLA applies to all:

- Public agencies, including state, local, and federal employers; local education agencies (schools); and
- Private-sector employers who employed 50 or more employees in 20 or more work weeks in the current or preceding calendar year and are engaged in commerce or in any industry or activity affecting commerce – including joint employers and successors of covered employers.

For purposes of a private-sector employer, when determining if the 50-employee threshold is met one must count full-time employees, part-time employees, suspended employees, and employees who are on leave, among other employees.

Employee Eligibility

To be eligible for FMLA benefits, an employee must:

1. Work for a covered employer;
2. Have worked for the employer for a total of 12 months;
3. Have worked at least 1,250 hours over the previous 12 months; and
4. Work at a location in the United States or in any territory or possession of the United States where at least 50 employees are employed by the employer within 75 miles.

Leave Entitlement

A covered employer must grant an eligible employee up to a total of 12 work weeks of unpaid leave during any 12-month period for one or more of the following reasons:

- The birth and care of the newborn child of the employee;
- Placement with the employee of a child for adoption or foster care;
- Care for an immediate family member (spouse, child, or parent) with a serious health condition; and/or
- Medical leave when the employee is unable to work because of a serious health condition.

The FMLA also allows eligible employees to take up to 26 workweeks of leave in a 12-month period to care for a covered servicemember with a serious injury or illness.

Background Checks/FCRA

The Fair Credit Reporting Act (FCRA) governs the extent to which an employer may obtain credit reports and background information, including criminal background information, from a consumer reporting agency about a "consumer." The FCRA defines "consumer" in part as any prospective or current employee for whom an employer requests a consumer report from a consumer reporting agency for the purpose of evaluating the person for employment, promotion, reassignment, or retention as an employee. Some, but not all, courts and the FTC apply the FCRA to reports on independent contractors.

The FCRA also governs the extent to which an employer may rely on credit and background information in making employment decisions.

The FCRA applies to all job applicants, current employees who may be promoted or reassigned, and current employees whom the employer is considering terminating or suspending.

The FCRA places these requirements on employers:

- All employers who want to obtain background information about a job applicant or current employee from a consumer reporting agency must have that person sign a "Fair Credit Reporting Act Disclosure and Consent Form." The employer must have the person's consent if the employer intends to use a consumer report to evaluate that person for employment, promotion, reassignment, or retention as an employee. The consent form must be a separate document from other application materials.
- An employer must send a "notification letter" to a job applicant or current employee before taking any adverse employment action (such as denying, suspending, reassigning, or terminating employment) based in whole or in part on a consumer report. Included with the notification letter must be a copy of the consumer report and a description of the rights provided by the Act.
- Once an employer decides to take an adverse action based in whole or in part on a consumer report, the employer must provide an "adverse action letter" to the job applicant or current employee. Although the adverse action letter may contain duplicative information previously contained in the notification letter, Federal Trade Commission opinion letters clarify that an employer must still provide the applicant or employee with such a letter.

An FCRA violation exposes an employer to both private litigation and federal government enforcement actions. While individual damages are capped at $1,000 for each violation, a court may assess attorneys' fees, court costs, or punitive damages.

Worker Adjustment and Retraining Notification Act (WARN)

The federal Worker Adjustment and Retraining Notification Act (WARN) requires employers to provide notice to employees at least 60 days before covered plant closings and covered mass layoffs. The required notice must be provided to either the affected workers or their representatives, the state's Dislocated Worker unit, and the appropriate local government unit.

WARN basics:

- The Act applies to employers with 100 or more employees, not counting employees who work on average less than 20 hours per week and those who have worked less than six months.
- The Act applies both to hourly and salaried employees, as well as managerial and supervisory employees.
- A covered plant closing occurs if an employment site is shut down, resulting in an employment loss for 50 or more employees during any 30-day period.
- A covered mass layoff occurs if there is a layoff, not the result of a plant closing, resulting in an employment loss for 500 or more employees (or 33 percent of the employer's active workforce) during any 30-day period.

WARN exceptions:

- WARN does not apply to the closing of temporary facilities.
- No notice is required where a strike or lockout occurring during labor negotiations results in a plant closing or mass layoff.

WARN remedies:

- Remedies include amounts equal to back pay and benefits for each affected employee for the period of violation up to 60 days, as well as potential civil penalties of up to $500 per day.
- A court may also choose to award attorneys' fees.

Occupational Safety and Health Act

The Occupational Safety and Health Act (OSH Act) requires an employer to provide a workplace free from hazards that cause or are likely to cause death or serious physical harm to employees. The Occupational Safety and Health Administration (OSHA) inspects employer compliance with OSH Act requirements and enforces the Act's workplace safety, recordkeeping, and reporting requirements. The OSH Act applies to any "person" – including any individual or organized group of persons – engaged in interstate commerce who has employees. The OSH Act excludes federal employers (except the U.S. Postal Service), self-employed individuals, family farms, or workplace hazards regulated by another federal agency (e.g., Mine Safety and Health Administration). Except for independent contractors, the OSH Act applies to all employees regardless of title, status, or means of compensation. Employers who are cited for a health and safety violation risk fines or civil penalties.