

Employment Law Guide

Laws, Regulations & Technical Assistance Services

A Compliance Assistance Resource

U.S. Department of Labor
Office of the Assistant Secretary for Policy
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Foreword



We at the Department of Labor believe that workers are best protected when employers, employees and the government work together to protect wages, benefits, pensions, safety and health.

To this end, we have developed a Department-wide initiative called Compliance Assistance, which envisions a cooperative approach toward all stakeholders, especially small businesses. Compliance Assistance complements our aggressive enforcement of the nation's worker protection laws.

We have developed a number of compliance materials in plain language, including on-line resources, which help answer questions and make our regulations easier to understand. The *Employment Law Guide*, which is available in both English and Spanish, is one of these Compliance Assistance tools.

We hope that, through use of this *Guide*, you will be better equipped to comply with our worker protection rules and regulations. Through this publication, as in all of our compliance assistance efforts, our goal is to better protect workers by helping both employers and employees understand our legal standards and meet them.

A handwritten signature in blue ink that reads "Elaine L. Chao".

Elaine L. Chao
Secretary of Labor



Preface to the Printed Edition

The *Employment Law Guide* began as a Web-based document. In that version, the Table of Contents includes certain chapters under more than one topic heading so that the information in those chapters can be accessed in more than one way. We have retained this structure for this *Guide* so that the two versions will be as similar as possible.

If you have access to the Web, you can go to www.dol.gov and access the home page of the organization within the Department of Labor that has jurisdiction over the matter under discussion, and obtain the address and telephone number from that page.

If you do not have Web access, or if you simply prefer to obtain this information by telephone, please call the Department's toll-free information service at 1-866-4-USA-DOL (TTY: 1-877-889-5627). The Customer Service Representative can provide you with contact information for all Department of Labor offices.

Likewise, you may find references to the text of various laws and regulations as you read the *Employment Law Guide*. Here, too, you may wish to consult the Department's Web site, if you have access to the Web. Otherwise, you can obtain the text of the various laws and regulations at any law library, and at most public libraries, either directly or through inter-library loan.



Employment Law Guide: Laws, Regulations, and Technical Assistance Services

Office of the Assistant Secretary for Policy

Preface

This *Guide* describes the statutes and regulations administered by the Department of Labor (DOL) that affect businesses and workers. The *Guide* is designed mainly for those needing “hands-on” information to develop wage, benefit, safety and health, and nondiscrimination policies for businesses in general industry.

Read the overview first to find out which requirements apply to your business. For each requirement, the overview references the relevant Department of Labor agency. Employers in certain industries (for instance, agriculture) will be advised to contact specific offices of the Department of Labor for further information.

Each chapter lists the telephone number of the Department of Labor agency that administers the laws and regulations addressed in that chapter. If you have any difficulty contacting a DOL agency (for instance, due to a telephone number that has been changed), or if you need referral information on any topic within DOL’s purview, call the Department’s toll-free service at 1-866-4-USA-DOL (1-866-487-2365).

The *Employment Law Guide* is offered as a public resource. It does not create new legal obligations, and it is not a substitute for the U.S. Code, *Federal Register*, and Code of Federal Regulations as the official sources of applicable law. Every effort has been made to ensure that the information provided is complete and accurate as of the time of publication and this will continue. Later versions of this *Guide* will be offered at www.dol.gov/compliance or by calling our toll-free service at the number noted above.

Small Business Regulatory Enforcement Fairness Act of 1996

You should also be aware that the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) places obligations on federal agencies and provides rights to small businesses. The Department of Labor’s Office of Small Business Programs oversees the Department’s SBREFA activities. You may also obtain information on SBREFA from the Small Business Administration (SBA).

Under SBREFA, the SBA has established an SBA Ombudsman and SBA Regional Fairness Boards. If you wish to comment directly to SBA on the enforcement actions of any Department of Labor agency, call 1-888-734-3247. You also may call your local DOL Regional Office or the Department of Labor’s Office of Small Business Programs at 202-693-6460.

Other Information for Employers and Employees

By itself or with other agencies, the Department of Labor administers several employment programs to assist both employees and employers. In particular, One-Stop Career Centers established under the Workforce Investment Act offer a variety of services for individuals seeking employment, as well as resources for employers seeking workers.

Also, employers and employees may wish to explore the Work Opportunity Tax Credit (WOTC) and the Welfare-to-Work tax credits. These credits can assist employers in their efforts to hire eligible low-income individuals.

Finally, employees who lose their jobs due to changes in business conditions in general may wish to file for unemployment insurance benefits, which are administered by the various states with assistance from the Department of Labor. Employees who lose their jobs due to increased imports from, or shifts in production to, foreign countries may be eligible for assistance under the Trade Adjustment Act program.

Further information about all of these programs and provisions can be found on the Web site of the Employment and Training Administration (www.doleta.gov).

Contents

OVERVIEW	1
A. WAGES AND HOURS OF WORK	
Minimum Wage and Overtime Pay	9
Wage Garnishment	13
Migrant and Seasonal Agricultural Worker Protection	15
Child Labor (Nonagricultural Work)	18
B. SAFETY AND HEALTH STANDARDS	
Occupational Safety and Health	21
Mine Safety and Health	30
Migrant and Seasonal Agricultural Worker Protection	15
Child Labor (Nonagricultural Work)	18
C. HEALTH BENEFITS AND RETIREMENT STANDARDS	
Employee Benefit Plans	34
Black Lung Compensation	40
Longshore and Harbor Workers' Compensation	43
D. OTHER WORKPLACE STANDARDS	
Family and Medical Leave	47
Lie Detector Tests	50
Whistleblower Protection	52
Plant Closings and Mass Layoffs	55
Union Members	57
Uniformed Service Members	61
E. WORK AUTHORIZATION FOR NON-U.S. CITIZENS	
Authorized Workers	63
Temporary Agricultural Workers (H-2A Visas)	64
Temporary Nonagricultural Workers (H-2B Visas)	67
Workers in Professional and Specialty Occupations (H-1B Visas)	69
Permanent Employment of Workers Based on Immigration	72
Nurses (H-1C Visas)	74
Crewmembers (D-1Visas)	76

F. FEDERAL CONTRACTS: WAGES, HOURS OF WORK, AND FRINGE BENEFITS	
Wages in Supply and Equipment Contracts	78
Prevailing Wages in Service Contracts	80
Prevailing Wages in Construction Contracts	82
Hours and Safety Standards in Construction Contracts	84
“Kickbacks” in Federally Funded Construction	86
G. FEDERAL CONTRACTS: EQUAL OPPORTUNITY	
Employment Discrimination and Equal Opportunity in Supply and Service Contracts	88
Employment Discrimination in Construction Contracts	92
Equal Opportunity for Individuals with Disabilities	96
Employment Discrimination and Equal Opportunity for Certain Veterans Who Served on Active Duty and Special Disabled Veterans	99
H. INDEX OF ACTS BY SPECIFIC INDUSTRY	
Agriculture	
Fair Labor Standards Act (FLSA)	9
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	15
Occupational Safety and Health Act (OSH Act)	21
Authorized Workers (Non-U.S. Citizens)	63
Temporary Agricultural Workers (H-2A Visas)	64
Immigration and Nationality Act (INA)	69
Mining	
Federal Mine Safety and Health Act of 1977	30
Black Lung Compensation	40
Construction	
Occupational Safety and Health Act (OSH Act)	21
Davis–Bacon Act and Related Acts	82
Copeland Act (“Kickbacks” in Federally Funded Construction)	86
Executive Order 11246 (Employment Discrimination in Construction Contracts)	92
Transportation	
Occupational Safety and Health Act (OSH Act)	21

Overview

Major Statutes and Regulations Administered by the Department of Labor

This *Guide* describes the requirements of each major statute enforced by the Department of Labor (DOL). The various chapters are organized by type of standard (e.g., Wages and Hours of Work; Safety and Health Standards; Health Benefits and Retirement Standards; Other Workplace Standards).

Each chapter discusses (1) which employers or employees are covered by the statute; (2) the statute's basic provisions and requirements; (3) employee rights; (4) how to obtain information and compliance assistance from DOL; (5) penalties or sanctions for non-compliance; and (6) relation of the statute to state, local and other federal laws.

The chapters contain more detailed information such as the texts of statutes, regulations, and interpretative bulletins, which can be found on DOL agencies' Web sites. To understand their full responsibilities under each statute, users should refer to these more detailed materials.

Please note that other federal agencies besides DOL enforce laws and regulations that affect employers. For example, the Equal Employment Opportunity Commission enforces many of the statutes designed to ensure non-discrimination in employment, and the National Labor Relations Board administers the Taft–Hartley Act regulating employer conduct with regard to employees in a wide range of areas. Please consult these agencies for further information on their requirements.

The Overview is structured to help businesses, particularly new businesses, determine which DOL statutes are most likely to apply to them. The first statutes discussed apply to most employers, followed by those that apply to federal contractors, and finally by the statutes that apply to specific industries, i.e., agriculture, mining, construction, and transportation.

Other sources of assistance include the following:

- DOL's Compliance Assistance Web page (www.dol.gov/compliance).
- A list of major DOL-enforced statutes (www.dol.gov/compliance).
- Employment Laws Assistance for Workers and Small Businesses (**elaws**) is located at www.dol.gov/elaws. This interactive system is designed to help employers and employees understand and comply with many laws administered by DOL. Each **elaws** Advisor provides information on a specific law or regulation based on the user's particular situation.

I. Requirements that Apply to Most Employers

A. Wages and Hours of Work

The Fair Labor Standards Act (FLSA) prescribes minimum wage and overtime pay standards as well as recordkeeping and child labor standards for most private and public employment, including work conducted in the home. The Wage and Hour Division of the Employment Standards Administration (ESA) administers this Act.

The minimum wage and overtime provisions of the FLSA require the following from employers of covered employees who are not otherwise exempt:

- As of September 1, 1997, employers must pay covered employees a minimum wage of not less than \$5.15 an hour. Employers may pay employees on a piece-rate basis and, under some circumstances, may consider tips as part of wages.
- Youths under 20 years of age may be paid a minimum wage of not less than \$4.25 an hour during the first 90 consecutive calendar days of employment with an employer. Employers may not displace any employee to hire someone at the youth minimum wage.
- Although the Act does not place a limit on the total hours which may be worked by an employee who is at least 16 years old, it does require that covered employees, unless otherwise exempt, be paid not less than one and one-half times their regular rates of pay for all hours worked in excess of 40 in a workweek.

In addition, the FLSA sets forth special rules for working out of the home. For example, in certain manufacturing industries, the employer must first obtain a certification permitting homework from the Wage and Hour Division of the Department of Labor.

As noted above, the FLSA's child labor provisions for nonagricultural work include restrictions on the hours of work and occupations for youths under age 16 and restrictions on employment of 16 and 17 year olds in occupations found to be hazardous by the Department.

Other generally applicable statutes that set workplace standards include:

- Under the Immigration and Nationality Act (INA), foreign workers may work in the U.S. ESA's Wage and Hour Division enforces rules pertaining to the employment of nonimmigrant workers in four visa classifications: D-1 (Crewmembers); H-1C (Registered Nurses); H-1B (workers employed in a "specialty occupation" or as fashion models); and H-2A (workers employed in temporary agricultural jobs). Under the INA, employers must verify the identity and employment authorization of all employees, including foreign workers.
- Garnishment of wages by employers is regulated under the Consumer Credit Protection Act. ESA's Wage and Hour Division administers this Act.

B. Safety and Health Standards

The Occupational Safety and Health Act (OSH Act), administered by the Department of Labor's Occupational Safety and Health Administration (OSHA), regulates safety and health conditions in most private industry workplaces (except those in industries, such as transportation and mining, which are regulated under other statutes).

OSHA sets safety and health standards by regulation.

- Safety standards cover hazards such as falls, explosions, fires, and cave-ins, as well as machine and vehicle operation and maintenance, etc.
- Health standards regulate exposure to a variety of health hazards through engineering controls, the use of personal protective equipment (e.g., respirators or hearing protection), and work practices.

Employers covered by the OSH Act are required to maintain safe and healthful workplaces. These employers must become familiar with job safety and health standards applicable to their establishments, comply with the standards, and

eliminate hazardous conditions to the extent possible. Employees must comply with all rules and regulations that apply to their own actions and practices.

Where OSHA has not set forth a specific standard, employers are responsible for complying with the OSH Act's "general duty" clause [Section 5(a)(1)], which states that each employer "shall furnish...a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

Specific safety and health standards developed by OSHA supersede the more general safety and health regulations originally issued under the Walsh-Healey Act, the Service Contract Act, the Contract Work Hours and Safety Standards Act, and the Arts and Humanities Act.

States operating under OSHA-approved state plans enforce safety and health standards in their respective states, while OSHA is responsible for enforcement in the remaining states.

Another generally applicable statute, the Fair Labor Standards Act (FLSA), prescribes the conditions under which minors (younger than 18) can safely work. These restrictions affect most private and public employment. ESA's Wage and Hour Division administers this Act.

C. Health Benefits and Retirement Standards

The Employee Retirement Income Security Act (ERISA) governs certain activities of most employers who have pension or welfare benefit plans. This Act preempts many state laws in this area. The Employee Benefits Security Administration (EBSA) administers ERISA.

ERISA covered pension plans must meet a wide range of fiduciary and reporting and disclosure requirements. EBSA's regulations define what constitutes plan assets, what is adequate consideration for the sale of plan assets, and the effects of control by participants over the assets in their plans, among other things.

Under ERISA, welfare benefit plans also must meet a wide range of fiduciary, reporting and disclosure requirements. The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) enacted provisions for disclosure and notification requirements for the continuation of health care. These provisions cover group health plans of employers with 20 or more employees on a typical business day in the previous calendar year. COBRA gives separated participants and beneficiaries an election to maintain coverage under the employer's health plan at their own expense for a limited period of time.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) added several provisions to ERISA, which are designed to provide participants and beneficiaries of group health plans with improved portability and continuity of health insurance coverage. These provisions are also designed to improve access to insurance and protect against discrimination on the basis of health status. Moreover, HIPAA requires that health insurance coverage be renewable for small employers in certain circumstances.

The statute also provides an insurance mechanism to protect certain types of retirement benefits by requiring that employers pay annual pension benefit insurance premiums to the Pension Benefit Guaranty Corporation (PBGC), which is associated with the Department of Labor. Pension insurance information can be obtained by writing Pension Benefits Guaranty Corporation, Processing and Technical Assistance Branch, 1200 K Street NW, Washington, DC 20006, or by calling 202-326-4000.

D. Other Workplace Standards

- The Family and Medical Leave Act (FMLA) requires employers of 50 or more employees (and all public agencies) to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the birth and care of a child, for placement with the employee of a child for adoption or foster care, or for the serious illness of the employee or an immediate family member. ESA's Wage and Hour Division administers this Act.
- Veterans' reemployment rights are protected for National Guard and Reserve members who are called to active duty. The Uniformed Services Employment and Reemployment Rights Act (USERRA) addresses the rights and responsibilities of individuals and their employers, and the Veterans' Employment and Training Service administers this Act.
- The Worker Adjustment and Retraining Notification Act (WARN) provides for early warning to employees of proposed layoffs or plant closings. The Employment and Training Administration can provide information on WARN, but since it does not have administrative or enforcement authority under WARN, it cannot provide specific advice or guidance with respect to individual situations.
- The Employee Polygraph Protection Act (EPPA) prohibits most uses of lie detectors by employers on their employees and job applicants. ESA's Wage and Hour Division administers this Act.
- The Labor-Management Reporting and Disclosure Act (LMRDA) (also known as the Landrum-Griffin Act) addresses the relationship between a union and its members. It ensures certain basic standards of democracy and fiscal responsibility in labor organizations. ESA's Office of Labor-Management Standards (OLMS) administers this Act.

II. Requirements that Apply to Employers Who Receive Federal Contracts, Grants or Financial Assistance

Non-discrimination and affirmative action requirements for federal contractors are set forth under Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act (38 USC 4212). These laws prohibit discrimination and require affirmative action with regard to race, color, religion, sex, national origin, and status as a qualified individual with a disability or a protected veteran. ESA's Office of Federal Contract Compliance Programs (OFCCP) administers these laws.

Various laws determine wage, hour, and fringe benefit standards for employees of federal contractors. These laws include: the Davis-Bacon and Related Acts (for construction); the Contract Work Hours and Safety Standards Act; the McNamara-O'Hara Service Contract Act (for services); and the Walsh-Healey Public Contracts Act (for manufacturing). ESA's Wage and Hour Division determines the required wage and benefit rates and enforces these statutes.

These Acts also authorize issuance of safety and health standards to covered contractors, unless specific standards issued by the Occupational Safety and Health Administration (OSHA) supersede them. *Contact your local OSHA Office for more detail on safety standards (1-800-321-OSHA).*

Employers who receive federal grants or financial assistance from the U.S. Department of Labor must comply with the provisions of Title VI of the Civil Rights Act of 1964, as amended, and Section 504 of the Rehabilitation Act of 1973, as amended. Entities

that receive federal financial assistance under the Workforce Investment Act of 1998 (WIA) or that run programs and activities that are part of the One-Stop Career Center delivery system are subject to section 188 of the WIA. Information about these requirements can be found on DOL's Equal Employment Opportunity Web page (www.dol.gov/dol/topic/discrimination/index.htm).

III. Requirements that Apply to Specific Industries

Many of the laws (e.g., the Occupational Safety and Health Act) described in the preceding sections also apply to businesses in the following industries.

A. Agriculture

Under the authority of the Occupational Safety and Health Act, OSHA has issued a number of safety standards that address such matters as field sanitation, overhead protection for operators of agricultural tractors, grain handling facilities, and guarding of farm field equipment and cotton gins. *Contact your local OSHA Office for more detail (1-800-321-OSHA).*

The Immigration and Nationality Act (INA) requires that employers wishing to use nonimmigrant workers for temporary agricultural employment under the H-2A visa classification apply to the Employment and Training Administration for a labor certificate showing that there are not sufficient workers in the U.S. who are able, willing, qualified and available to do the work, and that employment of such nonimmigrant workers will not adversely affect the wages and working conditions of workers in the U.S. Employers of such workers must comply with worker-protection provisions, including wage, transportation and housing safety standards. ESA's Wage and Hour Division enforces these provisions. *Contact your local ESA Wage and Hour Division Office for more detail (1-866-4USWAGE).*

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) requires that covered farm labor contractors, agricultural employers and agricultural associations comply with worker protection provisions applicable to migrant and seasonal agricultural workers whom they recruit, solicit, hire, employ, furnish or transport or, in the case of migrant agricultural workers, to whom they provide housing. ESA's Wage and Hour Division administers the requirements of MSPA. *Contact your local ESA Wage and Hour Division Office for more detail.*

The Fair Labor Standards Act (FLSA) contains special child labor regulations that apply to agricultural employment. The regulations administered and enforced by the Wage and Hour Division apply only to those establishments with employees (i.e., they do not apply to family-run and family-operated farms that do not hire outside workers). *Contact your local ESA Wage and Hour Division Office for more details.*

In addition, the Employment and Training Administration administers several agriculture-specific programs.

Finally, the Environmental Protection Agency (www.epa.gov) issues and enforces several safety and health standards (e.g., with respect to pesticides) that apply to this industry.

B. Mining

The Federal Mine Safety and Health Act of 1977 was enacted to improve working conditions in the nation's mines. This law strengthened an earlier coal mining law and brought metal and nonmetal miners under the same general protections as those

afforded coal miners. Its provisions cover all miners and other persons employed to work on mine property. The Mine Safety and Health Administration (MSHA) administers the Act.

Under the Act, the operators of mines, with the assistance of their employees, are responsible for ensuring the health and safety of the miners. Each mine must be registered with MSHA. Many mine operators must submit plans to MSHA before beginning operations, and such plans must be followed during mining.

The 1977 Act established mandatory miner training requirements and strengthened health protection measures and gassy mine safety programs. The Act also provided for closure of mines in cases of imminent danger to workers or failure to correct violations within the time allowed, greater involvement of miners and their representatives in processes affecting workers' health, and tougher civil monetary penalties for safety or health violations by mine operators.

MSHA's Coal Mine Safety and Health Division enforces the law and the regulations at underground and surface coal mines. MSHA's Metal and Nonmetal Mine Safety and Health Division enforces federal requirements at non-coal mines (including open pit mines, stone quarries, and sand and gravel operations).

Health and safety regulations developed and enforced by MSHA cover numerous hazards, including those associated with the following:

- Exposure to respirable dust, airborne contaminants and noise;
- Design, operation and maintenance requirements for mechanical equipment, including mobile equipment;
- Roof falls, and rib and face rolls;
- Flammable, explosive and noxious gases, dust and smoke;
- Electrical circuits and equipment;
- Fires;
- Hoisting; and
- Access and egress.

The Black Lung Benefits Act (BLBA), part of the Federal Mine Safety and Health Act of 1977, provides for monthly payments and medical treatment to coal miners totally disabled from pneumoconiosis (black lung disease). The Act also provides for payments to certain family members of miners who died from pneumoconiosis or are totally disabled because of it. ESA's Office of Workers' Compensation Programs, Division of Coal Mine Workers' Compensation, administers the Act.

C. Construction

Several Department of Labor agencies administer programs specifically related to the construction industry:

- Under the Occupational Safety and Health Act, OSHA sets and enforces construction safety and health standards.
- The Davis–Bacon Act and Related Acts require most contractors and subcontractors on federally assisted contracts in excess of \$2,000 to pay prevailing wage rates and fringe benefits, as determined by the Secretary of Labor through ESA's Wage and Hour Division.

- Under Executive Order 11246, ESA's Office of Federal Contract Compliance Programs has issued specific regulations on non-discrimination and affirmative action requirements for federal construction contractors and subcontractors.
- The "Anti-Kickback" section of the Copeland Act applies to all contractors and subcontractors performing on any federally funded or assisted contract for the construction or repair of any public building or public work, except contracts for which the only federal assistance is a loan guarantee. This provision precludes a contractor or subcontractor from in any manner inducing an employee to give up any part of the compensation to which he or she is entitled.

D. Transportation

Under the Occupational Safety and Health Act, OSHA issues and enforces standards for longshore work and the maritime industry. However, agencies outside of the Department of Labor administer many other laws affecting the transportation industry. For example, the Department of Transportation and the Railway Retirement Board primarily administer the Railway Labor Act.



Minimum Wage and Overtime Pay

Fair Labor Standards Act of 1938 (FLSA), as amended (29 USC §201 *et seq.*; 29 CFR 510-794)

Who is Covered

The Fair Labor Standards Act (FLSA) establishes standards for minimum wages, overtime pay, recordkeeping and child labor. These standards affect more than 100 million workers, both full-time and part-time, in the private and public sectors.

The Act applies to enterprises with employees who engage in interstate commerce, produce goods for interstate commerce, or handle, sell or work on goods or materials that have been moved in or produced for interstate commerce. For most firms, a test of not less than \$500,000 in annual dollar volume of business applies (i.e., the Act does not cover enterprises with less than this amount of business).

However, the Act does cover the following regardless of their dollar volume of business: hospitals; institutions primarily engaged in the care of the sick, aged, mentally ill or disabled who reside on the premises; schools for children who are mentally or physically disabled or gifted; preschools, elementary and secondary schools and institutions of higher education; and federal, state and local government agencies.

Employees of firms that do not meet the \$500,000 annual dollar volume test may be covered in any workweek when they are individually engaged in interstate commerce, the production of goods for interstate commerce, or an activity that is closely related and directly essential to the production of such goods.

The Act covers domestic service workers, such as day workers, housekeepers, chauffeurs, cooks, or full-time babysitters, if they receive at least \$1,300 (2001) in cash wages from one employer in a calendar year, or if they work a total of more than eight hours a week for one or more employers.

An enterprise that was covered by the Act on March 31, 1990, and that ceased to be covered because of the increase in the annual dollar volume test to \$500,000, as required under the 1989 amendments to the Act, continues to be subject to the overtime pay, child labor and recordkeeping requirements of the Act.

The Act exempts some employees from its overtime pay and minimum wage provisions, and it also exempts certain employees from the overtime pay provisions alone. Because the exemptions are narrowly defined, employers should check the exact terms and conditions for each by contacting their local Wage and Hour Division office. These offices are listed in most telephone directories under U.S. Government, Department of Labor, Wage and Hour Division.

The Employment Law Guide is offered as a public resource. It does not create new legal obligations, and it is not a substitute for the U.S. Code, Federal Register, and Code of Federal Regulations as the official sources of applicable law. Every effort has been made to ensure that the information provided is complete and accurate as of the time of publication and this will continue. Later versions of this Guide will be offered at www.dol.gov/compliance or by calling our toll-free service at 1-866-4-USA-DOL (1-866-487-2365).

The following are examples of employees exempt from both the minimum wage and overtime pay requirements:

- Executive, administrative and professional employees (including teachers and academic administrative personnel in elementary and secondary schools), outside sales employees, and certain skilled computer professionals (as defined in the Department of Labor's regulations);
- Employees of certain seasonal amusement or recreational establishments;
- Employees of certain small newspapers and switchboard operators of small telephone companies;
- Seamen employed on foreign vessels;
- Employees engaged in fishing operations;
- Employees engaged in newspaper delivery;
- Farm workers employed on small farms (i.e., those that used less than 500 "man-days" of farm labor in any calendar quarter of the preceding calendar year); and
- Casual babysitters and persons employed as companions to the elderly or infirm.

The following are examples of employees exempt from the overtime pay requirements only:

- Certain commissioned employees of retail or service establishments;
- Auto, truck, trailer, farm implement, boat or aircraft **salespersons** employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers;
- Auto, truck, or farm implement **parts-clerks** and **mechanics** employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers;
- Railroad and air carrier employees, taxi drivers, certain employees of motor carriers, seamen on American vessels, and local delivery employees paid on approved trip rate plans;
- Announcers, news editors and chief engineers of certain non-metropolitan broadcasting stations;
- Domestic service workers who reside in their employers' residences;
- Employees of motion picture theaters; and
- Farmworkers.

Certain employees may be partially exempt from the overtime pay requirements. These include:

- Employees engaged in certain operations on agricultural commodities and employees of certain bulk petroleum distributors;
- Employees of hospitals and residential care establishments which have agreements with the employees that they will work 14-day periods in lieu of 7-day workweeks (if the employees are paid overtime premium pay within the requirements of the Act for all hours worked over eight in a day or 80 in the 14-day work period, whichever is the greater number of overtime hours); and

- Employees who lack a high school diploma, or who have not completed the eighth grade, who spend part of their workweeks in remedial reading or training in other basic skills that are not job-specific. Employers may require such employees to engage in these activities up to 10 hours in a workweek. Employers must pay normal wages for the hours spent in such training but need not pay overtime premium pay for training hours.

Basic Provisions/Requirements

The Act requires employers of covered employees who are not otherwise exempt to pay these employees a minimum wage of not less than \$5.15 an hour as of September 1, 1997. Youths under 20 years of age may be paid a minimum wage of not less than \$4.25 an hour during the first 90 consecutive calendar days of employment with an employer. Employers may not displace any employee to hire someone at the youth minimum wage.

Employers may pay employees on a piece-rate basis, as long as they receive at least the equivalent of the required minimum hourly wage rate. Employers of tipped employees (i.e., those who customarily and regularly receive more than \$30 a month in tips) may consider such tips as part of their wages, but employers must pay a direct wage of at least \$2.13 per hour if they claim a tip credit. They must also meet certain other conditions.

The Act also permits the employment of certain individuals at wage rates below the statutory minimum wage under certificates issued by the Department of Labor:

- Student learners (vocational education students);
- Full-time students in retail or service establishments, agriculture, or institutions of higher education; and
- Individuals whose earning or productive capacities for the work to be performed are impaired by physical or mental disabilities, including those related to age or injury.

The Act does not limit either the number of hours in a day or the number of days in a week that an employer may require an employee to work, as long as the employee is at least 16 years old. Similarly, the Act does not limit the number of hours of overtime that may be scheduled. However, the Act requires employers to pay covered employees not less than one and one-half times their regular rates of pay for all hours worked in excess of 40 in a workweek, unless the employees are otherwise exempt.

Employers must keep records on wages, hours and other information as set forth in the Department of Labor's regulations. Most of this data is the type that employers generally maintain in ordinary business practice.

The Act prohibits performance of certain types of work in an employee's home unless the employer has obtained prior certification from the Department of Labor. Restrictions apply in the manufacture of knitted outerwear, gloves and mittens, buttons and buckles, handkerchiefs, embroideries, and jewelry (where safety and health hazards are not involved). Employers wishing to employ homeworkers in these industries are required to provide written assurances to the Department of Labor that they will comply with the Act's wage and other requirements, among other things.

The Act generally prohibits manufacture of women's apparel (and jewelry under hazardous conditions) in the home except under special certificates that may be issued when the employee cannot adjust to factory work because of age or disability (physical or mental), or must care for a disabled individual in the home.

Special provisions apply to state and local government employment.

It is a violation of the Act to fire or in any other manner discriminate against an employee for filing a complaint or for participating in a legal proceeding under the Act. The Act also prohibits the shipment of goods in interstate commerce that were produced in violation of the minimum wage, overtime pay, child labor, or special minimum wage provisions.

Employee Rights

Employees may find out how to file a complaint from local Wage and Hour Division offices, which are listed in most telephone directories under U.S. Government, Department of Labor, Wage and Hour Division, or from the program's toll-free information line at 1-866-4USWAGE.

In addition, an employee may file a private suit, generally for the previous two years of back pay (three years in the case of a willful violation) and an equal amount as liquidated damages, plus attorney's fees and court costs.

Compliance Assistance Available

More detailed information about the FLSA, including copies of explanatory brochures and regulatory and interpretative materials, is available from local Wage and Hour Division offices, which are listed in most telephone directories under U.S. Government, Department of Labor, Wage and Hour Division. Compliance assistance information may also be obtained on the Wage and Hour Division's Web site (www.wagehour.dol.gov). The **elaws** Fair Labor Standards Act Advisor (www.dol.gov/elaws) answers questions about workers and businesses that are subject to the FLSA.

Penalties/Sanctions

The Department of Labor uses a variety of remedies to enforce compliance with the Act's requirements. When Wage and Hour Division investigators encounter violations, they recommend changes in employment practices to bring the employer into compliance, and they request the payment of any back wages due to employees.

Willful violators may be prosecuted criminally and fined up to \$10,000. A second conviction may result in imprisonment. Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to civil money penalties of up to \$1,000 per violation.

When the Department of Labor assesses a civil money penalty, the employer has the right to file an exception to the determination within 15 days of receipt of the notice. If an exception is filed, it is referred to an administrative law judge for a hearing and determination as to whether the penalty is appropriate. If an exception is not filed, the penalty becomes final.

The Department of Labor may also bring suit for back pay and an equal amount in liquidated damages, and it may obtain injunctions to restrain persons from violating the Act.

Relation to State, Local and Other Federal Laws

State laws also apply to employment subject to this Act. When both this Act and a state law apply, the law setting the higher standards must be observed.

Wage Garnishment

Title III, Consumer Credit Protection Act (CCPA) (15 USC §1671 *et seq.*; 29 CFR 870)

Who is Covered

Title III of the Consumer Credit Protection Act (CCPA) protects employees from discharge by their employers because their wages have been garnished for any one debt, and it limits the amount of an employee's earnings that may be garnished in any one week. Title III applies to all employers and individuals who receive earnings for personal services (including wages, salaries, commissions, bonuses and income from a pension or retirement program, but ordinarily not including tips).

Basic Provisions/Requirements

Wage garnishment occurs when an employer withholds the earnings of an individual for the payment of a debt as the result of a court order or other equitable procedure. Title III prohibits an employer from discharging an employee because his or her earnings have been subject to garnishment for any one debt, regardless of the number of levies made or proceedings brought to collect it. Title III does not, however, protect an employee from discharge if the employee's earnings have been subject to garnishment for a second or subsequent debt.

Title III also protects employees by limiting the amount of earnings that may be garnished in any workweek or pay period to the lesser of 25 percent of disposable earnings or the amount by which disposable earnings are greater than 30 times the federal minimum hourly wage prescribed by Section 6(a)(1) of the Fair Labor Standards Act of 1938. This limit applies regardless of how many garnishment orders an employer receives. As of September 1, 1997, the federal minimum wage is \$5.15 per hour.

In court orders for child support or alimony, Title III allows up to 50 percent of an employee's disposable earnings to be garnished if the employee is supporting a current spouse or child, and up to 60 percent if the employee is not doing so. An additional five percent may be garnished for support payments over 12 weeks in arrears. The restrictions noted in the preceding paragraph do not apply to such garnishments.

"Disposable earnings" is the amount of earnings left after legally required deductions (e.g., federal, state and local taxes, Social Security, unemployment insurance and state employee retirement systems) have been made. Deductions not required by law (e.g., union dues, health and life insurance, and charitable contributions) are not subtracted from gross earnings when the amount of disposable earnings for garnishment purposes is calculated.

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Title III specifies that garnishment restrictions do not apply to bankruptcy court orders and debts due for federal and state taxes. Nor do they affect voluntary wage assignments, i.e., situations where workers voluntarily agree that their employers may turn over a specified amount of their earnings to a creditor or creditors.

Employee Rights

In most cases, Title III gives wage earners the right to receive at least partial compensation for the personal services they provide despite wage garnishment. This law also prohibits an employer from discharging an employee because of garnishment of wages for any one indebtedness. The Wage and Hour Division of the Employment Standards Administration accepts complaints of alleged Title III violations.

Compliance Assistance Available

The Wage and Hour Division administers and enforces Title III. More detailed information, including copies of explanatory brochures and regulatory and interpretative materials, may be obtained by contacting the local Wage and Hour offices (1-866-4USWAGE). Compliance assistance information is available from the Wage and Hour Division's Web site (www.wagehour.dol.gov).

Penalties/Sanctions

Violations of Title III may result in reinstatement of a discharged employee, payment of back wages, and restoration of improperly garnished amounts. Where violations cannot be resolved through informal means, the Department of Labor may initiate court action to restrain violators and remedy violations. Employers who willfully violate the discharge provisions of the law may be prosecuted criminally and fined up to \$1,000, or imprisoned for not more than one year, or both.

Relation to State, Local and Other Federal Laws

If a state wage garnishment law differs from Title III, the employer must observe the law resulting in the smaller garnishment, or prohibiting the discharge of an employee because his or her earnings have been subject to garnishment for more than one debt.

Migrant and Seasonal Agricultural Worker Protection

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA), as amended (29 USC §1801 *et seq.*)

Who is Covered

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) safeguards most migrant and seasonal agricultural workers in their interactions with farm labor contractors, agricultural employers, agricultural associations, and providers of migrant housing. However, some farm labor contractors, agricultural employers, agricultural associations, and providers of migrant housing are exempt from MSPA under limited circumstances.

Basic Provisions/Requirements

The MSPA requires farm labor contractors, agricultural employers, and agricultural associations who recruit, solicit, hire, employ, furnish, transport or house agricultural workers, as well as providers of migrant housing, to meet certain minimum requirements in their dealings with migrant and seasonal agricultural workers. These requirements include:

- **Farm labor contractor registration:** Farm labor contractors (and any employee who performs farm labor contracting functions) must register with the Department of Labor before recruiting, soliciting, hiring, employing, furnishing or transporting any migrant or seasonal agricultural worker. Agricultural employers and associations (and their employees) need not register as farm labor contractors.

An agricultural employer or association using the services of a farm labor contractor must first verify the registration status of the farm labor contractor. This process includes determining that the contractor is properly authorized for all activities he or she will undertake. To verify registration status, call 1-866-4USWAGE.

- **Employment relationship:** Under certain circumstances, the Department of Labor may determine that an agricultural employer or association that uses the services of a farm labor contractor is a joint employer of the agricultural workers furnished by the farm labor contractor. In joint employment situations, the agricultural employer or association is equally responsible with the farm labor contractor for compliance with employment-related MSPA obligations, such as the proper payment of wages.

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- **Disclosure:** Each migrant and seasonal day-haul worker must receive a written disclosure at the time of recruitment that describes the terms and conditions of his or her employment. When offering employment, the employer must provide such disclosure to all seasonal workers upon request. The disclosure must be written in the worker's language. The employer must also post in a conspicuous place at the job site a poster setting forth the rights and protections that MSPA affords workers. A housing provider must post or present to each worker a statement of the terms and conditions of occupancy.
- **Information and Recordkeeping:** Each farm labor contractor, agricultural employer or association that employs any agricultural worker must maintain payroll records for each worker showing the basis on which wages were paid, the number of piecework units earned, the number of hours worked, the total pay for each pay period, the amounts and reasons for any deductions, and the net pay.

The employer must provide all workers with these itemized statements and must preserve these records for three years. If a farm labor contractor is performing the payroll function, the contractor must provide a copy of the pay records to the person to whom the workers are furnished (e.g., agricultural employer or association), and that person must keep the records for three years. No farm labor contractor, agricultural employer, or association may knowingly provide false or misleading information to a worker about employment or the terms and conditions of employment.

- **Wages, Supplies, and Working Arrangements:** Each person employing agricultural workers must pay all wages owed when due. Farm labor contractors, agricultural employers and associations are prohibited from requiring workers to purchase goods or services solely from such contractor, employer or association or any person acting as an agent for such a person. In addition, no farm labor contractor, agricultural employer or association may violate the terms of the working arrangement without adequate justification.
- **Safety and Health of Housing:** Each person who owns or controls housing provided to migrant agricultural workers must ensure that the facility complies with the federal and state safety and health standards covering that housing. Migrant housing may not be occupied until it has been inspected and certified to meet these safety and health standards. The certification of occupancy must be posted at the site.
- **Transportation Safety:** Each vehicle used to transport migrant or seasonal agricultural workers must be properly insured and operated by a properly licensed driver. Each such vehicle must also meet federal and state safety standards.
- **Employer Protections:** Farm labor contractors must comply with the terms of any written agreement they make with an agricultural employer or association.
- **Enforcement:** The Wage and Hour Division enforces MSPA. During a MSPA investigation, Wage and Hour investigators may enter and inspect premises (including vehicles and housing), review and transcribe payroll and other records, and interview employers and employees.

Employee Rights

The MSPA provides migrant agricultural workers and day-haul seasonal agricultural workers the right to receive written notice of the terms and conditions of their employment when recruited; it provides seasonal workers the right to receive such

notification upon the worker's request. The MSPA also requires employers of migrants and seasonal agricultural workers to adhere to the disclosed terms and conditions of employment. Certain exemptions and exclusions apply to these provisions.

The MSPA also gives migrant and seasonal agricultural workers the right to file a complaint with the Wage and Hour Division, file a private lawsuit under the Act (or cause a complaint or lawsuit to be filed), or testify or cooperate with an investigation or lawsuit in other ways without being intimidated, threatened, restrained, coerced, blacklisted, discharged or discriminated against in any manner.

Compliance Assistance Available

Copies of Wage and Hour publications may be obtained from the nearest office of the Wage and Hour Division, which is listed in most telephone directories under U.S. Government, Department of Labor. Information about farm labor contractor applications is available from the nearest State Workforce Agency office or any Wage and Hour Division office (1-866-4USWAGE). Compliance assistance information appears on the Wage and Hour Division's Web site (www.wagehour.dol.gov).

Penalties/Sanctions

Violations of MSPA may result in civil money penalties, back wage assessments, and revocations of certificates of registration. Violations may also result in civil or criminal actions instituted by the Department of Labor against any person found in violation of the Act. Civil money penalties up to \$1,000 may be assessed for each violation. Criminal conviction for first time violators may result in one year in prison and a \$1,000 fine; repeat convictions can result in up to three years in prison and \$10,000 in fines. In addition, individuals whose MSPA rights have been violated may seek civil money damages in federal court.

Relation to State, Local and Other Federal Laws

MSPA supplements any state or local law. Compliance with MSPA does not excuse violation of applicable state laws or regulations.

Child Labor (Nonagricultural Work)

Fair Labor Standards Act of 1938 (FLSA), as amended (29 USC §201 *et seq.*; 29 CFR 570-580)

Who is Covered

The child labor provisions of the Fair Labor Standards Act (FLSA) are designed to protect the educational opportunities of youths and to prohibit their employment in jobs and under conditions detrimental to their health and well-being.

In nonagricultural work, the child labor provisions apply to enterprises with employees engaging in interstate commerce, producing goods for interstate commerce, or handling, selling or working on goods or materials that have been moved in or produced for interstate commerce. For most firms, an annual dollar volume of business test of not less than \$500,000 applies.

The Act covers the following employers regardless of their dollar volume of business: hospitals; institutions primarily engaged in the care of the sick, aged, mentally ill or disabled who reside on the premises; schools for children who are mentally or physically disabled or gifted; preschools, elementary and secondary schools and institutions of higher education; and federal, state and local government agencies.

Employees of firms that do not meet the \$500,000 annual dollar volume test may be covered in any workweek in which they are individually engaged in interstate commerce, the production of goods for interstate commerce, or an activity that is closely related and directly essential to the production of such goods.

An enterprise that was covered by the Act on March 31, 1990, and is no longer covered because of the increase in the annual dollar volume test to \$500,000 under the 1989 amendments to the Act, remains subject to the Act's child labor provisions.

While 16 is the minimum age for most nonfarm work, youths aged 14 and 15 may work outside of school hours in certain occupations under certain conditions. They may, at any age: deliver newspapers; perform in radio, television, movies, or theatrical productions; work for their parents in their solely owned nonfarm businesses (except in mining, manufacturing, or in any other occupation declared hazardous by the Secretary); or gather evergreens and make evergreen wreaths.

Basic Provisions/Requirements

The child labor provisions include restrictions on hours of work and occupations for youths under age 16. These provisions also set forth 17 hazardous occupations orders for jobs that the Secretary has declared too dangerous for those under age 18 to perform.

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The Act prohibits the interstate shipment of goods produced in violation of the child labor provisions. It is also a violation of the Act to fire or in any other manner discriminate against an employee for filing a complaint or for participating in a legal proceeding under the Act.

The permissible jobs and hours of work, by age, in nonfarm work are as follows:

- Youths age 18 or older are not subject to restrictions on jobs or hours;
- Youths age 16 and 17 may perform any job not declared hazardous by the Secretary, and are not subject to restrictions on hours;
- Youths age 14 and 15 may work outside school hours in various nonmanufacturing, nonmining, nonhazardous jobs under the following conditions: no more than three hours on a school day, 18 hours in a school week, eight hours on a non-school day, or 40 hours in a non-school week. In addition, they may not begin work before 7 a.m. nor work after 7 p.m., except from June 1 through Labor Day, when evening hours are extended until 9 p.m. Those enrolled in an approved Work Experience and Career Exploration Program (WECEP) may work up to 23 hours in school weeks and three hours on school days (including during school hours).

Detailed information on the occupations determined to be hazardous by the Secretary is available from the Wage and Hour Division offices.

By regulation, employers must keep records of the dates of birth of employees under age 19, their daily starting and quitting times, their daily and weekly hours of work, and their occupations. Employers may protect themselves from unintentional violation of the child labor provisions by keeping on file an employment or age certificate for each young worker to show that the youth is the minimum age for the job. Certificates issued under most state laws are acceptable for this purpose.

Employee Rights

The FLSA prohibits employers from engaging in oppressive child labor, as defined by the Act. The FLSA also gives an employee the right to file a complaint with the Wage and Hour Division and testify or in other ways cooperate with an investigation or legal proceeding without being fired or discriminated against in any other manner.

Compliance Assistance Available

More detailed information, including copies of explanatory brochures and regulatory and interpretative materials, may be obtained by contacting the Wage and Hour Division offices (1-866-4USWAGE). Compliance assistance information may be found on the Wage and Hour Division's Web site (www.wagehour.dol.gov).

Penalties/Sanctions

Employers are subject to a civil money penalty of up to \$10,000 (\$11,000 for violations occurring after January 6, 2002) per worker for each violation of the child labor provisions. When a civil money penalty is assessed, employers have the right to file an exception to the determination within 15 days of receipt of the notice of such penalty.

When an exception is filed, it is referred to an administrative law judge for a hearing and determination as to whether the penalty is appropriate. Either party may appeal the decision of the administrative law judge to the Secretary of Labor. If an exception is not timely filed, the penalty becomes final.

The Act also provides for a criminal fine of up to \$10,000 upon conviction for a willful violation. For a second conviction for a willful violation, the Act provides for a fine of not more than \$10,000 and imprisonment for up to six months, or both. The Secretary may also bring suit to obtain injunctions to restrain persons from violating the Act.

Relation to State, Local and Other Federal Laws

Many states have child labor laws. When both this Act and a state law apply, the law setting the higher standards must be observed.

Occupational Safety and Health

The Occupational Safety and Health Act of 1970 (OSH Act) (29 USC §651 *et seq.*; 29 CFR 1900 to end)

Who is Covered

In general, the Act covers all employers and their employees in the 50 states, the District of Columbia, Puerto Rico, and other U.S. territories. Coverage is provided either directly by the federal Occupational Safety and Health Administration (OSHA) or by an OSHA-approved state job safety and health plan. Employees of the U.S. Postal Service also are covered.

The Act defines an employer as any “person engaged in a business affecting commerce who has employees, but does not include the United States or any state or political subdivision of a State.” Therefore, the Act applies to employers and employees in such varied fields as manufacturing, construction, longshoring, agriculture, law and medicine, charity and disaster relief, organized labor and private education.

The Act does not cover:

- Self-employed persons;
- Farms which employ only immediate members of the farmer’s family;
- Industries in which other federal agencies, operating under the authority of other federal laws, regulate working conditions. This category includes most working conditions in mining, nuclear energy and nuclear weapons manufacture, and many aspects of the transportation industries; and
- Employees of state and local governments, unless they are in one of the states with OSHA-approved safety and health plans.

Basic Provisions/Requirements

The Act assigns OSHA two regulatory functions: setting standards and conducting inspections to ensure that employers are providing safe and healthful workplaces. OSHA standards may require that employers adopt certain practices, means, methods or processes reasonably necessary and appropriate to protect workers on the job. Employers must become familiar with the standards applicable to their establishments and eliminate hazards.

Compliance with standards may include ensuring that employees have and use personal protective equipment when required for safety or health. Employees must comply with all rules and regulations that apply to their own actions and conduct.

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Even in areas where OSHA has not set forth a standard addressing a specific hazard, employers are responsible for complying with the OSH Act's "general duty" clause. The general duty clause [Section 5(a)(1)] states that each employer "shall furnish. . . a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

States with OSHA-approved job safety and health plans must set standards that are at least as effective as the equivalent federal standard. Most of the state-plan states adopt standards identical to the federal ones (three states, New Jersey, New York and Connecticut, have plans which cover only public sector employees).

Federal OSHA Standards. Standards are grouped into four major categories: general industry (29 CFR 1910); construction (29 CFR 1926); maritime (shipyards, marine terminals, longshoring—29 CFR 1915-19); and agriculture (29 CFR 1928). While some standards are specific to just one category, others apply across industries. Among the standards with similar requirements for all sectors of industry are those that address access to medical and exposure records, personal protective equipment, and hazard communication.

- **Access to Medical and Exposure Records:** This regulation requires the employer to grant the employee access to any medical records the employer maintains with respect to that employee, including any records about the employee's exposure to toxic substances.
- **Personal Protective Equipment:** This standard, which is defined separately for each segment of industry except agriculture, requires employers to provide employees with personal equipment designed to protect them against certain hazards. This equipment can range from protective helmets to prevent head injuries in construction and cargo handling work, to eye protection, hearing protection, hard-toed shoes, special goggles for welders, and gauntlets for iron workers.
- **Hazard Communication:** This standard requires manufacturers and importers of hazardous materials to conduct hazard evaluations of the products they manufacture or import. If a product is found to be hazardous under the terms of the standard, the manufacturer or importer must so indicate on containers of the material, and the first shipment of the material to a new customer must include a material safety data sheet (MSDS). Employers must use these MSDSs to train their employees to recognize and avoid the hazards presented by the materials.

OSHA regulations cover such items as recordkeeping, reporting and posting.

- **Recordkeeping:** Every employer covered by OSHA who has more than 10 employees, except for employers in certain low-hazard industries in the retail, finance, insurance, real estate, and service sectors, must maintain three types of OSHA-specified records of job-related injuries and illnesses.

The OSHA Form 300 is an injury/illness log, with a separate line entry for each recordable injury or illness. Such events include work-related deaths, injuries and illnesses other than minor injuries that require only first aid treatment and that do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job. Each year, the employer must post a summary of the OSHA Form 300 on a Form 300A, which includes the previous year's injuries and illnesses, in the workplace from February through April.

OSHA Form 301 is an individual incident report that provides added detail about each specific recordable injury or illness. A suitable insurance or workers'

compensation form that provides the same details may be substituted for OSHA Form 301.

Employers with 10 or fewer employees and employers in statistically low-hazard industries (listed in 29 CFR 1904, Subpart B) are exempt from maintaining these records. Industries currently designated as low-hazard include: automobile dealers; apparel and accessory stores; eating and drinking places; most finance, insurance, and real estate industries; and certain service industries, such as personal and business services, medical and dental offices, and legal, educational, and membership organizations.

However, in one situation such employers must still keep these records. Each year, the Department of Labor's Bureau of Labor Statistics (BLS) conducts a national survey of workplace injuries and illnesses. Participants are selected by the individual states, and all employers selected for the survey, even those usually exempt from the recordkeeping requirements, must maintain these records. Before the end of the year, OSHA notifies all selected employers to begin keeping records during the coming year. The state offices that selected the employers are available to help employers complete the forms.

- **Reporting:** Each employer, regardless of industry category or the number of its employees, must advise the nearest OSHA office of any accident that results in one or more fatalities or the hospitalization of three or more employees. The employer must so notify OSHA within eight hours of the occurrence of the accident. OSHA often investigates such accidents to determine whether violations of standards contributed to the event.

Voluntary Protection Program. The Voluntary Protection Program (VPP) is an OSHA initiative aimed at extending worker protection beyond the minimum required by OSHA standards. This program, along with others such as expanded on-site consultation services and full-service area offices, is a cooperative approach that, when coupled with an effective enforcement program, expands worker protection to help meet the goals of the OSH Act of 1970.

The VPP is designed to:

- Recognize the outstanding achievements of those who have successfully incorporated comprehensive safety and health programs into their total management systems;
- Motivate others to achieve excellent safety and health results in the same outstanding way; and
- Establish a relationship between employers, employees, and OSHA that is based on cooperation rather than coercion.

OSHA reviews an employer's VPP application and visits the worksite to verify that the safety and health program described is in effect at the site. OSHA conducts annual evaluations for Merit and Demonstration programs and triennial evaluations for Star programs. All participants must send their injury information annually to their OSHA regional offices. Sites participating in the VPP are not scheduled for programmed inspections. However, OSHA handles any employee complaints, serious accidents or significant chemical releases according to routine procedures.

An employer may apply for a VPP at the nearest OSHA regional office. If OSHA approves the written qualifications, it schedules an onsite review. The review team presents its findings in a report for the company's evaluation before submitting it to the Assistant Secretary for Occupational Safety and Health.

If the report is approved, the Assistant Secretary sends a letter to the employer informing him or her of the worksite's participation in the VPP, and the employer receives a certificate and flag at a ceremony held at or near the approved worksite. Employers at Star sites that are reapproved after triennial evaluation receive plaques at similar ceremonies.

The VPP is available in states under federal jurisdiction. Some states with their own safety and health programs have similar programs. Interested companies in these states should contact the appropriate state agency for more information.

Employee Rights

The Act grants employees several important rights. Among them are the right to complain to OSHA about safety and health conditions in their workplaces and have their identities kept confidential from employers, to contest the amount of time OSHA allows for correcting violations of standards, and to participate in OSHA workplace inspections.

Private sector employees who exercise their rights under OSHA can be protected against employer reprisal, as described in Section 11(c) of the OSH Act. Employees must notify OSHA within 30 days of the time they learned of the alleged discriminatory action. OSHA will then investigate, and if it agrees that discrimination has occurred, OSHA will ask the employer to restore any lost benefits to the affected employee. If necessary, OSHA can take the employer to court. In such cases, the worker pays no legal fees.

Compliance Assistance Available

- **Standards:** The *Federal Register* is an excellent source of information on standards, since all OSHA standards are published there when made final, as are all amendments, corrections, insertions and deletions. The *Federal Register* is published five days a week, and it is available in many public libraries. Annual subscriptions are available from the Superintendent of Documents, U.S. Government Printing Office (GPO), Washington, DC 20402. OSHA also provides copies of its *Federal Register* notices on its Web site (www.osha.gov).

Each year the Office of the *Federal Register* publishes all current regulations and standards in the Code of Federal Regulations (CFR), also available at many public libraries and from GPO. OSHA's regulations and standards, which are collected in several volumes in Title 29 CFR, Parts 1900-1999, are also available on OSHA's Web page on standards. In addition, OSHA has a compliance assistance section on its Web site. For a fee, GPO offers a data text-retrieval package in CD-ROM format that contains all OSHA standards, compliance directives and standards interpretations.

Finally, a number of Expert Advisors help employers and workers to understand and apply OSHA's regulations.

Because states with OSHA-approved job safety and health programs adopt and enforce their own standards under state law, copies of these standards can be obtained from the individual states.

- **Training and Education:** OSHA has more than 70 full-service field offices that offer a variety of informational services, such as publications, technical advice, audio-visual aids on workplace hazards, and lecturers for speaking engagements.

The OSHA Training Institute in Des Plaines, Illinois, provides basic and advanced training and education in safety and health for federal and state compliance safety and health officers; state consultants; other federal agency personnel; and private sector employers, employees and their representatives. Course topics include electrical hazards, machine guarding, ventilation, and ergonomics, among others.

The Institute's facility includes classrooms, laboratories, a library and an audio-visual unit. The laboratories contain various demonstrations and equipment, such as power presses, woodworking and welding shops, a complete industrial ventilation unit, and a noise demonstration laboratory. Sixty-one courses are available for students from the private sector addressing subjects such as safety and health in the construction industry and methods of voluntary compliance with OSHA standards.

OSHA also provides funds to nonprofit organizations so that they can conduct workplace training and education. OSHA annually identifies areas of unmet needs for safety and health education in the workplace and invites grant applications to address these needs. Grants are awarded annually.

Organizations awarded grants use the funds to develop training and educational programs, reach out to workers and employers for whom their programs are appropriate, and deliver the programs to employers and employees. The Training Institute is OSHA's point of contact for learning about the many valuable training products and materials developed under such grants.

While OSHA does not distribute grant materials directly, it provides addresses and telephone numbers of persons from whom the public can order such materials. However, OSHA does provide limited lending of grant-produced audiovisual training programs through the Resource Center Audiovisual Circulation Project. Contact the OSHA Training Institute at 847-297-4810.

- **Consultation Assistance:** Consultation assistance is available to employers who want help in establishing and maintaining safe and healthful workplaces. Largely funded by OSHA, the service is available in every state and territory. It is provided at no cost to the employer. Primarily targeted toward smaller employers with more hazardous operations, the consultation service is delivered by state government agencies or universities employing professional safety consultants and health consultants.

On-site OSHA consultation assistance includes an opening conference with the employer to explain the ground rules for consultation, a walk through the workplace to identify specific hazards and to examine those aspects of the employer's safety and health program that relate to the scope of the visit, and a closing conference. Later, the consultant sends a report of findings and recommendations to the employer.

This process begins with the employer's request for consultation, which must include a commitment to correct any serious job safety and health hazards identified. The consultant will not report possible violations of OSHA standards to OSHA enforcement staff unless the employer fails or refuses to eliminate or control worker exposure to any identified serious hazard or imminent danger. Should this occur, OSHA may investigate and begin enforcement action. The employer must also agree to allow the consultant to confer freely with employees during the on-site visit.

Additional information about consultation assistance, including a directory of OSHA-funded consultation projects, can be obtained by requesting OSHA publication No. 3047, *Consultation Services for the Employer*.

- **Information Sources:** Information about state programs, VPPs, consultation programs, and inspections can be obtained from the nearest OSHA regional, area, or district office. Area offices are listed in local telephone directories under the U.S. Department of Labor. Regional and area office addresses, telephone and fax numbers can be found on the OSHA Web site (www.osha.gov/html/oshdir.html).

The OSHA Home Page (www.osha.gov) contains information on other OSHA activities, statistics, media releases, and technical assistance, as well as links to other safety and health Web sites. OSHA has a number of interactive advisors to help employers comply with OSHA standards.

A single free copy of an OSHA catalog, “OSHA Publications and Audiovisual Programs” (OSHA 2019), may be obtained by sending a self-addressed mailing label to the U.S. Department of Labor, OSHA Publications Office, P.O. Box 37535, Washington, DC 20013-7535; telephone 202-693-1888. This catalog contains descriptions of and ordering information for all OSHA publications and audiovisual programs.

A variety of information is available on OSHA’s Publications Web site, including online publication order forms, the OSHA poster, guidance on OSHA recordkeeping, and online access to several OSHA publications in PDF format (www.osha.gov/pls/publications/pubindex.list).

Questions about OSHA programs, the status of ongoing standards-setting activities, and general inquiries about OSHA may be addressed to the U.S. Department of Labor, OSHA Office of Public Affairs, 200 Constitution Avenue NW, Room N-3637, Washington, DC 20210; telephone 202-693-1999.

Penalties/Sanctions

Every establishment covered by the Act is subject to inspection by OSHA compliance safety and health officers (CSHOs). These individuals, who are chosen for their knowledge and experience in occupational safety and health, are thoroughly trained in OSHA standards and in the recognition of occupational safety and health hazards. In states with their own occupational safety and health plans, state CSHOs conduct inspections.

OSHA conducts two general types of inspections, programmed and unprogrammed. Establishments with high injury rates receive programmed inspections, while unprogrammed inspections are used in response to fatalities, catastrophes, and complaints (which are further addressed by OSHA’s complaint policies and procedures). Various OSHA publications and documents detail OSHA’s policies and procedures for inspections.

Types of violations that may be cited and the penalties that may be proposed:

- **Other-Than-Serious Violation:** A violation that has a direct relationship to job safety and health, but probably would not cause death or serious physical harm. A proposed penalty of up to \$7,000 for each violation is discretionary. A penalty for an other-than-serious violation may be adjusted downward by as much as 95 percent, depending on the employer’s good faith (demonstrated efforts to comply with the Act), history of previous violations, and size of business. When the adjusted penalty amounts to less than \$50, no penalty is proposed.

- **Serious Violation:** A violation where a substantial probability that death or serious physical harm could result and where the employer knew, or should have known, of the hazard. A mandatory penalty of up to \$7,000 for each violation is proposed. A penalty for a serious violation may be adjusted downward, based on the employer's good faith, history of previous violations, the gravity of the alleged violation, and size of business.
- **Willful Violation:** A violation that the employer intentionally and knowingly commits. The employer either knows that what he or she is doing constitutes a violation, or is aware that a hazardous condition existed and has made no reasonable effort to eliminate it.

The Act provides that an employer who willfully violates the Act may be assessed a civil penalty of not more than \$70,000 but not less than \$5,000 for each violation. A proposed penalty for a willful violation may be adjusted downward, depending on the size of the business and its history of previous violations. Usually no credit is given for good faith.

If an employer is convicted of a willful violation of a standard that has resulted in the death of an employee, the offense is punishable by a court-imposed fine or by imprisonment for up to six months, or both. A fine of up to \$250,000 for an individual, or \$500,000 for a corporation [authorized under the Omnibus Crime Control Act of 1984 (1984 OCCA), not the OSH Act], may be imposed for a criminal conviction.

- **Repeated Violation:** A violation of any standard, regulation, rule or order where, upon reinspection, a substantially similar violation is found. Repeated violations can bring fines of up to \$70,000 for each such violation. To serve as the basis for a repeat citation, the original citation must be final; a citation under contest may not serve as the basis for a subsequent repeat citation.
- **Failure to Correct Prior Violation:** Failure to correct a prior violation may bring a civil penalty of up to \$7,000 for each day the violation continues beyond the prescribed abatement date.

Additional violations for which citations and proposed penalties may be issued:

- **Falsifying Records, Reports or Applications:** Upon conviction, can bring a fine of \$10,000 or up to six months in jail, or both.
- **Assaulting a CSHO:** This act, or otherwise resisting, opposing, intimidating, or interfering with a CSHO in the performance of his or her duties, is a criminal offense, subject to a fine of not more than \$250,000 for an individual and \$500,000 for a corporation (1984 OCCA) and imprisonment.

Citation and penalty procedures may differ somewhat in states with their own OSH programs.

Appeals process:

- **Appeals by Employees:** If a complaint from an employee prompted the inspection, the employee or authorized employee representative may request an informal review of any decision not to issue a citation.

Employees may not contest citations, amendments to citations, penalties or lack of penalties. They may contest the time allowed in the citation for abatement of a hazardous condition. They also may contest an employer's Petition for Modification of Abatement (PMA), which requests an extension of the abatement period.

Employees who wish to contest the PMA must do so within 10 working days of its posting or within 10 working days after an authorized employee representative has received a copy.

Within 15 working days of the employer's receipt of the citation, the employee may submit a written objection to OSHA regarding the abatement date. The OSHA area director forwards the objection to the Occupational Safety and Health Review Commission, which operates independently of OSHA.

Employees may request an informal conference with OSHA to discuss any issues raised by an inspection, citation, notice of proposed penalty, or the employer's notice of intention to contest.

- **Appeals by Employers:** When issued a citation or notice of a proposed penalty, an employer may request an informal meeting with OSHA's area director to discuss the case. Employee representatives may be invited to attend the meeting. To avoid prolonged legal disputes, the area director is authorized to enter into settlement agreements that may revise citations and penalties.
- **Notice of Contest:** If the employer decides to contest the citation, the time set for abatement, or the proposed penalty, he or she has 15 working days from the time the citation and proposed penalty are received in which to notify the OSHA area director in writing. An orally expressed disagreement will not suffice. This written notification is called a "Notice of Contest."

There is no specific format for the Notice of Contest. However, it must clearly identify the employer's basis for contesting the citation, notice of proposed penalty, abatement period, or notification of failure to correct violations. To better identify the scope of the contest, it also should identify the inspection number and citation number(s) being contested.

A copy of the Notice of Contest must be given to the employees' authorized representative. If any affected employees are unrepresented by a recognized bargaining agent, a copy of the notice must be posted in a prominent location in the workplace, or else served personally upon each unrepresented employee.

- **Appeal Review Procedure:** If the written Notice of Contest has been filed within 15 working days, the OSHA area director forwards the case to the Occupational Safety and Health Review Commission (OSHRC). The Commission is an independent agency not associated with OSHA or the Department of Labor. The Commission assigns the case to an administrative law judge.

The judge may disallow the contest if it is found to be legally invalid, or a hearing may be scheduled for a public place near the employer's workplace. The employer and the employees have the right to participate in the hearing; the OSHRC does not require that they be represented by attorneys.

Once the administrative law judge has ruled, any party to the case may request a further review by OSHRC. Also, any of the three OSHRC commissioners may individually move to bring a case before the Commission for review. Commission rulings may be appealed to the U.S. Courts of Appeals.

- **Appeals In State-Plan States:** States with their own occupational safety and health programs have their own systems for review and appeal of citations, penalties, and abatement periods. The procedures are generally similar to Federal OSHA's, but a state review board or equivalent authority hears cases.

Relation to State, Local and Other Federal Laws

The agency covers all working conditions that are not addressed by safety and health regulations of another federal agency under other legislation. OSHA also has the authority to monitor the safety and health of federal employees. Finally, OSHA is also responsible for administering a number of whistleblower laws relating to safety and health as described in the Whistleblower Protection section of this *Guide* (www.dol.gov/asp/programs/guide/whistle.htm).

Mine Safety and Health

The Federal Mine Safety and Health Act of 1977 (Mine Act) (30 USC §§ 801 *et seq.*; 30 CFR Parts 1 to 199)

Who is Covered

The Mine Act covers all mine operators and miners throughout the U.S., including the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands. Under the Mine Act, a mine “operator” is defined as: “any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing service or construction at such mine.” A “miner” is any individual working in a coal or other mine. At this time, the Mine Act covers approximately 300,000 miners and almost 14,000 mines.

Basic Provisions/Requirements

The Mine Act requires that the Mine Safety and Health Administration (MSHA) inspect all mines each year. All underground mines are to receive at least four inspections annually; all surface operations are to be inspected at least twice annually. MSHA is specifically prohibited from giving advance notice of an inspection, and it is specifically authorized to enter mine property without a warrant.

The Mine Act requires or authorizes additional inspections and investigations to ensure safe and healthy work environments for miners. For example, mines that release large amounts of methane gas are to receive more frequent inspections; mines determined to be exceptionally hazardous may receive more frequent inspections. Additionally, MSHA must investigate all fatal accidents and miners’ complaints of discrimination based upon the exercise of their rights under the Mine Act.

To promote compliance with the provisions of the Act and its safety and health standards, all violations found during inspections and investigations must be cited. All violations are subject to civil penalties, and all violations must be corrected within the time frames established by MSHA.

The Mine Act permits representatives of the operator and the miners to accompany MSHA during inspections and participate in pre- and post-inspection conferences. If violations are cited, the circumstances surrounding the violations are discussed during post-inspection conferences.

If these discussions do not result in resolution, the mine operator may appeal the citation and the penalty to the Federal Mine Safety and Health Review Commission,

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an independent body, with further appeal to the U.S. Courts of Appeals. In addition to setting safety and health standards for preventing hazardous and unhealthy conditions, MSHA's regulations establish requirements for immediate notification of accidents, injuries and illnesses; for training programs that meet the statutory requirements of the Mine Act; and for obtaining approval for certain equipment used in gassy underground mines.

Mine operators must notify MSHA when they open or close a mine, and they may request the modification of an existing safety standard on a site-by-site basis. Under the Mine Act, MSHA may approve modifications only if it determines that the alternate method proposed will guarantee no less than the same measure of protection afforded by the existing standards, or that the application of MSHA's standard at the mine will result in a diminution of safety for miners.

Employee Rights

A good safety and health program depends on the active participation and interest of everyone at a worksite. Because Congress wants to encourage an active, responsible role for all parties in matters of mine safety and health, the Federal Mine Safety and Health Act of 1977 gives individual miners, their representatives, and job applicants many rights. Deaths, injuries, and illnesses in the workplace can be decreased if all parties take advantage of these rights.

The Act gives miners the rights to:

- Designate a representative to accompany federal inspectors during inspections at a mine;
- Obtain an inspection of the mine where reasonable grounds exist to believe that an imminent danger, or a violation of the Act or of a safety or health standard exists;
- Receive health and safety training;
- Be paid during certain periods of time when a mine or part of a mine has been closed because of a withdrawal order;
- Be protected against discrimination based on the exercise of rights under the Act; and
- Be informed of, and participate in, enforcement and legal proceedings under the Act.

Miners' representatives also have specific rights under the Act in addition to those rights given to individual miners. Moreover, applicants for mine work have the right not be discriminated against in hiring because they have previously exercised rights provided under the Act.

If a miner, representative of miners, or job applicant, has general or specific questions about rights under the Act, he or she should contact the nearest MSHA office. The MSHA Web site (www.msha.gov) lists locations and telephone numbers for its offices nationwide.

Compliance Assistance Available

MSHA develops safety and health training programs in cooperation with industry and labor, tests new mining equipment, works with other agencies to advance safety and health research programs, and compiles and analyzes accident, injury and illness data to better address serious workplace hazards.

MSHA has developed booklets, pamphlets and pocket-size laminated cards, which address known safety and health hazards and identify acceptable compliance processes. MSHA routinely distributes its accident prevention materials to the mining industry at large, or to those sectors of the industry that are experiencing the injuries addressed by the materials.

MSHA's Web site (www.msha.gov) contains compliance assistance information, guidance, and helpful tips for the mining community. For example, it lists upcoming seminars designed for mine operators and others to receive the latest information about the requirements of a rule or to hear about solutions to various safety and health problems.

Also, the Web site provides model forms, records, and plans for the mine operator to use to comply with MSHA requirements, thus avoiding the need for the operator to create these items independently. Through the Web site, mine operators may file various reports directly with MSHA.

The Mine Act authorizes a state grants program, funded at about \$7.6 million annually, which MSHA administers. MSHA works with the states to stimulate the development of individual state programs that focus on identifiable safety and health problems. Many of the states use the grants for education and training, particularly for smaller mining operations that cannot provide updated, effective training.

MSHA's Mine Health and Safety Academy, located in Beckley, West Virginia, develops and provides safety and health training courses for its own inspectors as well as for industry and labor. A "Mine Simulation Laboratory", located on the Academy grounds, provides hands-on training in rescue and recovery operations for certain mine emergencies.

MSHA's Approval and Certification Center (A&CC), located near Wheeling, West Virginia, houses laboratories, equipment and personnel to test equipment that must be approved before it can be used in certain areas of gassy underground mines. The A&CC also is responsible for monitoring the performance of approved products to ensure that they meet the standards under which they were originally approved.

A variety of information on MSHA's programs, as well as its existing and proposed standards, can be found on MSHA's Web site. Also, MSHA has a number of **elaws** Advisors (www.dol.gov/elaws) that provide assistance in understanding and applying MSHA's regulations.

MSHA maintains a 24-hour toll-free telephone number that can be used to report accidents. That number is 1-800-746-1553. MSHA maintains another toll-free number to report hazardous conditions. That number is 1-800-746-1554, and the caller need not identify himself or herself. The appropriate district office also can be contacted.

Additional information about MSHA, its programs and policies may be obtained from the MSHA Office of Information, Room 601, 4015 Wilson Boulevard, Arlington, Virginia, 22203-1984. The telephone number is 202-693-9422.

Penalties/Sanctions

The Mine Act established a maximum penalty of \$10,000 per violation against mine operators for violations found and cited. As a result of the Omnibus Budget Reconciliation Act of 1990, the maximum was increased to \$55,000.

Non-serious violations (violations that are not designated “significant and substantial”) that are promptly corrected normally receive a “single penalty” assessment of \$55. More serious violations and non-serious violations that are not promptly corrected are usually assessed using a formula that incorporates six criteria specified for determining penalty amounts by the Mine Act.

Some violations are of such a nature or seriousness that use of the formula would not result in an appropriate penalty. In these cases—most often involving fatalities, serious injuries, and unwarranted failure to comply with standards—MSHA may waive the formula and propose a “special assessment.” In developing such an amount, the facts are independently reviewed to determine a penalty amount that will have the deterrent effect contemplated by the Statute. Title 30, Part 100 of the Code of Federal Regulations contains the regulations governing the civil penalty process.

The Mine Act also provides for either civil penalties against individuals for “knowing” violations, or criminal sanctions against mine operators who “willfully” violate safety and health standards. MSHA reviews particular citations and orders for possible knowing or willful violations. In general, the violations reviewed include those involving imminently dangerous situations and a high degree of negligence or reckless disregard. MSHA initiates and conducts investigations of possible knowing or willful violations. If evidence of willful violations is found, the case is referred to the Department of Justice.

Relation to State, Local and Other Federal Laws

The Mine Act does not give MSHA the authority to cede its responsibilities to states or any other political subdivisions. The Mine Act does not preempt state mine safety and health laws, except insofar as they may conflict with the Mine Act or MSHA’s regulations. States may have more stringent health and safety standards.

Employee Benefit Plans

Employee Retirement Income Security Act (ERISA), (29 USC §1001 *et seq.*, 29 CFR 2509 *et seq.*)

Who is Covered

The provisions of Title I of ERISA cover most private sector employee benefit plans. Such plans are voluntarily established and maintained by an employer, an employee organization, or jointly by one or more such employers and an employee organization.

Pension plans—a type of employee benefit plan—are established and maintained to provide retirement income or to defer income until termination of covered employment or beyond. Other employee benefit plans, called welfare plans, are established and maintained to provide health benefits, disability benefits, death benefits, prepaid legal services, vacation benefits, day care centers, scholarship funds, apprenticeship and training benefits, or other similar benefits.

In general, ERISA does not cover plans established or maintained by government entities or churches for their employees, or plans which are maintained solely to comply with workers' compensation, unemployment or disability laws. ERISA also does not cover plans maintained outside the U.S. primarily for the benefit of nonresident aliens or unfunded excess benefit plans.

Basic Provisions/Requirements

ERISA sets uniform minimum standards to ensure that employee benefit plans are established and maintained in a fair and financially sound manner. In addition, employers have an obligation to provide promised benefits and satisfy ERISA's requirements for managing and administering private pension and welfare plans.

The Department's Employee Benefits Security Administration (EBSA), together with the Internal Revenue Service (IRS), has the statutory and regulatory authority to ensure that workers receive the promised benefits. The Department has principal jurisdiction over Title I of ERISA, which requires persons and entities that manage and control plan funds to:

- Manage plans for the exclusive benefit of participants and beneficiaries;
- Carry out their duties in a prudent manner and refrain from conflict-of-interest transactions expressly prohibited by law;
- Comply with limitations on certain plans' investments in employer securities and properties;

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- Fund benefits in accordance with the law and plan rules;
- Report and disclose information on the operations and financial condition of plans to the government and participants; and
- Provide documents required in the conduct of investigations to ensure compliance with the law.

The Department also has jurisdiction over the prohibited transaction provisions of Title II of ERISA. However, the IRS generally administers the rest of Title II of ERISA, as well as the standards of Title I of ERISA that address vesting, participation, nondiscrimination and funding.

Reporting and Disclosure. Any individual or organization affected by ERISA may request an advisory opinion or information letter about the interpretation or application of the statutory provisions (or the implementing regulations, interpretive bulletins or exemptions) within the Department's jurisdiction. *ERISA Procedure 76-1*, 41 *Federal Register* 36281 (August 27, 1976) sets forth the procedures governing the advisory opinion process.

Part 1 of Title I requires the administrator of an employee benefit plan to furnish participants and beneficiaries with a summary plan description (SPD), clearly describing their rights, benefits and responsibilities under the plan. Plan administrators must also furnish participants with a summary of any material changes to the plan or changes to the information contained in the SPD. Copies of these documents need not be automatically filed with the Department, but they must be furnished to the Department on request.

In addition, the administrator generally must file an annual report (Form 5500 Series) each year containing financial and other information about the operation of the plan. Plan administrators filing annual reports must furnish participants and beneficiaries with a summary of the information in the annual report (the Summary Annual Report).

Certain pension and welfare benefit plans may be exempt from the requirement to file an annual report. For example, welfare benefit plans with fewer than 100 participants that are fully insured or unfunded within the meaning of the Department's regulation at 29 CFR 2520.104-20 are not required to file an annual report.

The Department's regulations governing these reporting and disclosure requirements are set forth beginning at 29 CFR 2520.101-1.

Fiduciary Standards. Part 4 of Title I sets forth standards and rules for the conduct of plan fiduciaries. In general, persons who exercise discretionary authority or control over management of a plan or disposition of its assets are "fiduciaries" for purposes of Title I of ERISA. Fiduciaries are required, among other things, to discharge their duties solely in the interest of plan participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan. In discharging their duties, fiduciaries must act prudently and in accordance with documents governing the plan, to the extent such documents are consistent with ERISA.

ERISA prohibits certain transactions between an employee benefit plan and "parties in interest," which include the employer and others who may be in a position to exercise improper influence over the plan, and such transactions may trigger civil monetary penalties under Title I of ERISA. The Internal Revenue Code ("Code") also prohibits most of these transactions, and it imposes an excise tax on "disqualified persons" (whose definition generally parallels that of parties in interest) who participate in such transactions.

Exemptions. Both ERISA and the Code contain various statutory exemptions from the prohibited transaction rules and give the Departments of Labor and Treasury, respectively, authority to grant administrative exemptions and establish exemption procedures. Reorganization Plan No. 4 of 1978 transferred the Treasury Department's authority over prohibited transaction exemptions to the Labor Department, with certain exceptions.

The statutory exemptions generally include loans to participants, the provision of services needed to operate a plan for reasonable compensation, loans to employee stock ownership plans, and investment with certain financial institutions regulated by other state or federal agencies. (See ERISA Section 408 for the conditions of the exemptions.) The Department of Labor may grant administrative exemptions on a class or individual basis for a wide variety of proposed transactions with a plan. Applications for individual exemptions must include, among other information:

- A detailed description of the exemption transaction and the parties for whom an exemption is requested;
- The reasons a plan would have for entering into the transaction;
- The percentage of assets involved in the exemption transaction;
- The names of persons with investment discretion;
- The extent of plan assets already invested in loans to, property leased by, and securities issued by parties in interest involved in the transaction;
- Copies of all contracts, agreements, instruments and relevant portions of plan documents and trust agreements bearing on the exemption transaction;
- Information about plan participation in pooled funds when the exemption transaction involves such funds;
- A declaration by the applicant, under penalty of perjury, attesting to the truth of representations made in such exemption submissions; and
- Statement of consent by third-party experts acknowledging that their statement is being submitted to the Department as part of an exemption application.

The Department's exemption procedures are set forth at 29 CFR 2570.30 through 2570.51.

Continuation of Health Coverage. The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) included provisions for continuing health care coverage. These provisions, which are codified in Part 6 of Title I of ERISA, apply to group health plans of employers with 20 or more employees on a typical working day in the previous calendar year.

COBRA gives "qualified beneficiaries" (a covered employee's spouse and dependent children) the right to maintain, at their own expense, coverage under their health plan that would be lost due to a "qualifying event", such as termination of employment, at a cost comparable to what it would be if they were still members of the employer's group.

Plans must give covered individuals an initial general notice informing them of their rights under COBRA and describing the law. The law also obliges plan administrators, employers, and qualified beneficiaries to provide notice of certain "qualifying events." In most instances of employee death, termination, reduced hours of employment,

entitlement to Medicare, or bankruptcy, the employer must provide a specific notice to the plan administrator. The plan administrator must then advise the qualified beneficiaries of the opportunity to elect continuation coverage.

The Department's regulatory and interpretive jurisdiction over the COBRA provisions is limited to the COBRA notification and disclosure provisions.

Jurisdiction of the Internal Revenue Service. The IRS has regulatory and interpretive responsibility for all provisions of COBRA not under the Department's jurisdiction. In addition, the IRS generally administers and interprets the ERISA provisions relating to participation, vesting, funding and benefit accrual, contained in parts 2 and 3 of Title I.

Health Insurance Portability and Accounting Act of 1996. The Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. 104-191, was enacted on August 21, 1996. HIPAA amended ERISA to provide for improved portability and continuity of health insurance coverage connected with employment, among other things.

The HIPAA portability provisions relating to group health plans and health insurance coverage offered in connection with group health plans are set forth under a new Part 7 of Subtitle B of Title I of ERISA. These provisions include rules relating to exclusions of preexisting conditions, special enrollment rights, and prohibition of discrimination against individuals based on health status-related factors.

The Newborns' and Mothers' Health Protection Act of 1996, signed into law on September 26, 1996, requires plans that offer maternity coverage to pay for at least a 48 hour hospital stay following childbirth (a 96 hour stay when a cesarean section is performed).

The Women's Health and Cancer Rights Act, signed into law on October 21, 1998, contains protection for patients who elect breast reconstruction in connection with a mastectomy. For plan participants and beneficiaries receiving benefits in connection with a mastectomy, plans offering coverage for a mastectomy must also cover reconstructive surgery and other benefits related to a mastectomy.

Employee Rights

The Act grants employees several important rights. Among them are the right to receive important information about their pension or health benefit plans, to participate in timely and fair processes for benefit claims, to elect to temporarily continue group health coverage after losing coverage, to receive certificates verifying health coverage under a plan, and to recover benefits due under the plan.

Compliance Assistance Available

EBSA has numerous general publications designed to help employers and employees understand their obligations and rights under ERISA. A list of EBSA booklets and pamphlets is available by writing to: U.S. Department of Labor, Publications Desk, EBSA, Division of Public Affairs, Room N-5656, 200 Constitution Avenue NW, Washington, DC 20210. Many of these documents are available from EBSA's Home Page (www.dol.gov/ebsa), and through EBSA's toll-free publications line at 1-800-998-7542.

The **elaws** Small Business Retirement Savings Advisor (www.dol.gov/elaws) provides answers to a variety of questions about retirement savings options for small business employers and indicates which program is most appropriate for a business.

EBSA's national and field offices offer individualized assistance for persons seeking information and assistance on benefits and rights under employee benefit plans. EBSA also issues advisory opinions and information letters in response to requests from individuals and organizations. Advisory opinions apply the law to a specific set of facts, while information letters merely call attention to well-established principles or interpretations. Further information about these programs is contained in EBSA's booklet on "Customer Service Standards."

In addition, employee benefit plan documents and other materials are available from the EBSA Public Disclosure Room. This facility may be used to view and to obtain copies of materials on file. Materials include: summary plan descriptions, Form 5500 Series reports, Master Trust reports, 103-12 Investment Entity Reports, Common or Collective Trust or Pooled Separate Account direct filings, Apprentice and Other Training Plans notices, "Top Hat" plan statements, advisory opinions, exemptions, announcements and transcripts of public hearings and proceedings.

The EBSA Public Disclosure Room is open to the public Monday through Friday, from 8:30 a.m. to 4:30 p.m. Copies of materials are available at a cost of 15 cents per page by ordering in person or writing to: U.S. Department of Labor, EBSA Public Disclosure Room, Room N-1513, 200 Constitution Avenue NW, Washington, DC 20210. Given the complexity of ERISA requirements, employers may wish to seek the assistance of an attorney, CPA firm, investment or brokerage firm, and other employee benefit consultants.

Penalties/Sanctions

ERISA confers substantial law enforcement responsibilities on the Department. Part 5 of Title I of ERISA gives the Department authority to bring a civil action to correct violations of the law, provides investigative authority to determine whether any person has violated Title I, and imposes criminal penalties on any person who willfully violates any provision of Part 1 of Title I.

EBSA has authority under ERISA Section 502(c)(2) to assess civil penalties for reporting violations. A penalty of up to \$1,000 per day may be assessed against plan administrators who fail or refuse to comply with annual reporting requirements. Section 502(i) gives the agency authority to assess civil penalties against parties in interest who engage in prohibited transactions with welfare and nonqualified pension plans. The penalty can range from five percent to 100 percent of the amount involved in a transaction.

A parallel provision of the Code directly imposes an excise tax against disqualified persons, including employee benefit plan sponsors and service providers, who engage in prohibited transactions with tax-qualified pension and profit sharing plans.

Finally, Section 502(l) requires the Department to assess mandatory civil penalties equal to 20 percent of any amount recovered with respect to fiduciary breaches resulting from either a settlement agreement with the Department or a court order as the result of a lawsuit by the Department.

Relation to State, Local and Other Federal Laws

Part 5 of Title I states that the provisions of ERISA Titles I and IV supersede state and local laws which “relate to” an employee benefit plan. ERISA, however, does not preempt certain state and local laws, including state insurance regulation of multiple employer welfare arrangements (MEWAs). MEWAs generally constitute employee welfare benefit plans or other arrangements providing welfare benefits to employees of more than one employer, not pursuant to a collective bargaining agreement.

In addition, ERISA’s general prohibitions against assignment or alienation of pension benefits do not apply to qualified domestic relations orders. Plan administrators must comply with the terms of qualifying orders made pursuant to state domestic relations law that award all or part of a participant’s benefit in the form of child support, alimony, or marital property rights to an alternative payee (spouse, former spouse, child or other dependent). Finally, group health plans covered by ERISA must provide benefits in accordance with the requirements of qualified medical child support orders issued under state domestic relations laws.

Black Lung Compensation

Title IV, Federal Mine Safety and Health Act of 1977, as amended (30 USC §901 *et seq.*; 20 CFR 718, 722, 725, 726, 727)

Who is Covered

The Black Lung Benefits Act (BLBA) provides for monthly payments to and medical treatment for coal miners totally disabled from pneumoconiosis (black lung disease) arising from employment in or around the nation's coal mines. The BLBA also provides for augmented payments to miners based on the number of his or her dependents and to certain survivors of miners who died due to or while totally disabled from pneumoconiosis.

Each coal mine operator is required to pay an excise tax, based on the operator's tonnage and price of coal sold, to support payment of benefits to miners under the Act and the cost of administering the Act. In addition, operators must provide for the payment of benefits to miners, either directly or through insurance, when they are the responsible employer of the miners.

For purposes of determining responsibility for paying benefits, a coal mine operator includes: (1) any owner, lessee or other person who operates, controls, or supervises a coal mine or preparation plant, or (2) any independent contractor performing services or construction at a mine, or (3) companies transporting coal from mines to preparation plants.

Basic Provisions/Requirements

Current and former coal miners (including certain coal transportation and coal mine construction workers who were exposed to coal mine dust), and their surviving dependents, including surviving spouses, orphaned children, and totally dependent parents, brothers and sisters, may file claims for black lung benefits.

Basic monthly benefits for a totally disabled miner or his or her surviving spouse, as well as for claimants with qualified dependents, can be found at www.dol.gov/esa/regs/compliance/owcp/blbene2k.htm. Benefit payments are reduced by the amounts received for pneumoconiosis under state workers' compensation awards and by excess earnings in some cases. Benefits rates are adjusted periodically according to the percentage increase of federal pay rates.

Medical payments are limited to the treatment of conditions directly related to black lung disease, and only totally disabled former miners can qualify for this benefit. The Act covers certain medical, surgical and other expenses, such as hospital and nursing care, rehabilitation services, and drug and equipment charges.

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The Black Lung Disability Trust Fund pays the cost of black lung claims: (1) where the miner's last coal mine employment was before January 1, 1970; or (2) where no responsible coal mine operator has been identified in claims where the miner's last coal employment was after December 31, 1969; or (3) where the responsible coal mine operator has defaulted on the payment of such benefits.

Coal mine operators identified as responsible for claims based on employment after 1970 must provide for the required benefits either directly or through insurance. A tax paid by coal mine operators on each ton sold supports the Trust Fund. The current rate is \$1.10 per ton for underground-mined coal and \$.55 for surface-mined coal, subject to a cap of 4.4 percent of the sales price.

Coal mine operators may secure payment of benefits for which they are liable either by qualifying as a self-insurer or by obtaining insurance through a commercial insurance carrier or a state agency. Operators must obtain approval from the Department of Labor to become self-insurers. To qualify, they must have been in the business of coal mining for at least three years, demonstrate the ability to service black lung claims and agree to service claims in a timely manner, meet minimum asset requirements, and obtain an indemnity bond or post other security to secure payment of benefits, among other things. Operators may appeal a denial to self-insure to the Department of Labor. When operators obtain commercial insurance, their obligations with regard to payment of benefits and provision of medical treatment are binding on the insurance carriers.

Coal mine operators are required to begin paying benefits within 30 days of a final determination of their liability for the benefits. Where payment is made from the Trust Fund pending appeal of a claim and final determination, operators must reimburse the Trust Fund.

Employee Rights

If an employee, or his or her survivor, or an employer disagrees with a claim determination by the Division of Coal Mine Workers' Compensation, that party may request a formal hearing before an administrative law judge. The administrative law judge's decision may be appealed to the Benefits Review Board, and the Benefits Review Board's decision may be appealed to the U.S. Court of Appeals and finally to the U.S. Supreme Court.

Compliance Assistance Available

To obtain additional information, contact the nearest Black Lung district office. These offices are listed in the local telephone books under U.S. Government, Department of Labor, Employment Standards Administration, Office of Workers' Compensation Programs, Division of Coal Mine Workers' Compensation.

Questions about insurance and self-insurance requirements should be addressed to: U.S. Department of Labor, ESA/OWCP/DCMWC, Branch of Standards, Regulations and Procedures, Responsible Operator Section, Room C-3526, 200 Constitution Avenue NW, Washington, DC 20210.

The telephone number is 202-693-0047, and the fax number is 202-693-1398. The Black Lung Home Page is located at www.dol.gov/esa/regs/compliance/owcp/bltable.htm.

Penalties/Sanctions

The Department of Labor may suspend or revoke the authority to self-insure due to an operator's failure to comply with the Act and its regulations, the insolvency of its surety on an indemnity bond, or impairment of the operator's financial responsibility.

Revocation of the authority to self-insure or the failure to obtain insurance does not relieve operators of liability for payment of benefits and provision of medical treatment. Operators who fail to secure insurance may be subject to a civil money penalty of \$1,000 for each day insurance is not in effect.

A lien may be placed against the property of operators who fail to pay benefits for which they have been determined liable or to reimburse the Trust Fund. The Department of Labor may also seek an injunction in U.S. District Court to ensure that such obligations are met and to prevent future noncompliance. Operators are also subject to payment of interest on the benefit payments or Trust Fund reimbursements owed, and they may be assessed an additional 20 percent of the amount due, which is payable to the claimant.

Operators who knowingly conceal or dispose of any property to avoid the payment of benefits under the Act may be guilty of a misdemeanor and, if convicted, subject to a fine of \$1,000, imprisonment for up to one year, or both.

Relation to State, Local and Other Federal Laws

Federal black lung benefits are offset by state workers' compensation benefits for the same disease. If state black lung benefits are less than federal black lung benefits, then the federal black lung program covers the difference. Social Security disability benefits are also reduced by the amount of black lung benefits received.

Longshore and Harbor Workers' Compensation

Longshore and Harbor Workers' Compensation Act (LHWCA) (33 USC § 901 *et seq.*; 20 CFR 701-704)

Who is Covered

The Longshore and Harbor Workers' Compensation Act (LHWCA) provides for compensation and medical care to employees disabled from injuries that occur on the navigable waters of the U.S., or in adjoining areas used in loading, unloading, repairing or building a vessel. The Act also offers benefits to dependents if the injury causes the employee's death. The term "injury" includes occupational disease arising out of employment.

The Act covers workers employed in maritime occupations, including longshore workers or other persons in longshore operations, and any harbor workers, including ship repairers, shipbuilders, and shipbreakers. The Act excludes the following individuals if they are covered by a state workers' compensation law: office employees, certain retail and service employees, small vessel workers and individuals engaged in repairing certain recreational vessels, and masters or members of a crew of any vessel.

Employers of covered employees are responsible for insuring the payment of compensation and medical benefits to injured employees. Private insurance carriers or employers who are authorized by the Department of Labor to become self-insured provide this insurance. While a Special Fund administered by the Department of Labor may pay benefits in certain circumstances, authorized insurance carriers and self-insured employers fund most benefits under the LSHCA. ESA's Office of Workers' Compensation Programs (OWCP) administers the Act.

In addition to longshore and other maritime workers, the LHWCA covers a variety of other employees through several extensions to the Act. The District of Columbia Workmen's Compensation Act (enacted in 1928 and repealed effective July 26, 1982) provides benefits for employees in private employment in the District of Columbia who sustain injuries or illnesses as a result of employment prior to July 26, 1982. (Workers injured after this date are provided for under a workers' compensation act administered by the District of Columbia Government.)

Also, the Defense Base Act (1941) covers employees of U.S. contractors outside the continental U.S., Alaska and Hawaii, while the Nonappropriated Fund Instrumentalities Act (1952) provides for benefits for civilian employees of post exchanges, service clubs, etc. of the Armed Forces. The Outer Continental Shelf Lands Act (1953) provides coverage to employees of private industry conducting certain operations on the Outer Continental Shelf of the U.S.

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Basic Provisions/Requirements

An injured employee is eligible to receive compensation for disability at the rate of $66 \frac{2}{3}$ percent of the employee's average weekly wage, subject to the specified maximum in effect at the time of injury, for as long as the effects of the injury continue. Compensation is also available for permanent impairment of specified limbs and organs and to replace loss of earning capacity.

Benefits are paid to a widow or widower, or other eligible survivors, at the rate of 50 percent of the national average weekly wage as determined by Secretary of Labor, applicable at the time of injury, or the employee's full wage, if less.

The maximum compensation rate is 200 percent of the current national average weekly wage as determined by Secretary of Labor, applicable at the time of injury, or the employee's full average weekly wage, whichever is less. Current benefit levels are found at www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm.

Within 10 days from the date of an employee's injury or death, or 10 days from the date an employer has knowledge of an employee's injury or death, including any disease or death proximately caused by the employment, the employer must furnish a report to the district director for the compensation district in which the injury or death occurred, and thereafter furnish additional or supplemental reports as the district director may request.

No report is to be filed unless the injury causes the employee to lose one or more shifts from work. However, the employer must keep records containing the following information: (1) the name, address, and occupation of the employer; (2) the name, address, and occupation of the employee; (3) the cause, nature, and other relevant circumstances of the injury or death; (4) the year, month, day, and hour when, and the particular locality where, the injury or death occurred; and (5) such other information as OWCP may require.

Every employer shall maintain adequate records of injuries sustained by employees, including information on the disease, other impairments or disabilities, or death relating to the injury. Employers must make such records available for inspection by OWCP or by any state authority, and they should retain records for three years after the date of injury.

Employers must secure insurance for workers' compensation coverage under the Act, either through an authorized insurance carrier or by obtaining approval to self-insure from OWCP. To self-insure, the employer must furnish OWCP with proof of his or her ability to pay compensation directly and deposit security in the form of an indemnity bond or negotiable securities.

Once insurance has been obtained, the employer may request a certificate from the district director in the compensation district where he or she has operations, showing that payment of compensation has been secured. Only one certificate will be issued to an employer in a compensation district, and it will be valid only during the period for which the employer has secured such payment.

When an employer obtains insurance through a private insurance carrier, the employer's obligation to pay monetary benefits and provide medical benefits is binding on the insurance carrier.

The employer or insurance carrier must pay compensation payments periodically, promptly and directly to the person entitled to benefits under the Act.

An employer may apply to OWCP for an exemption to coverage by certifying a particular facility as one engaging in building, repairing or dismantling of small vessels exclusively and not receiving a federal maritime subsidy. (Small vessels are defined as commercial barges which are under 900 lightship displacement tons (long) or a commercial tugboat, towboat, crewboat, supply boat, fishing vessel or other work vessel which is under 1,600 tons gross.)

Once a facility is certified, injuries sustained there would not be covered under the Act except for injuries which occur over the navigable waters of the U.S., including any adjoining pier, wharf, dock, or facility over the land for launching vessels. A facility otherwise covered under the Act remains covered until certification of exemption is issued. This exemption from coverage is not intended for use by employers whose facilities are used exclusively to work on small vessels.

The Special Fund was established so that, under certain circumstances, the employer's liability is limited if an employee has a pre-existing permanent partial disability. In these cases, benefits are paid from the Special Fund after 104 weeks. For OWCP to make this determination, the employer must request limitation of its liability and file a fully documented application with OWCP as soon as the claimant's condition becomes known or is an issue in dispute.

An employer may not discharge or in any manner discriminate against an employee because he or she has claimed or attempted to claim compensation, or has participated in a proceeding under this Act. This prohibition does not prevent discharge of or refusal to employ a person who has been found to have filed a fraudulent claim for compensation or who has otherwise made a false statement or misrepresentation.

Employee Rights

If an employee or his or her survivor(s), or an employer or insurance carrier, disagrees with a recommendation of OWCP, a formal hearing may be requested before an administrative law judge. The administrative law judge's decision may in turn be appealed to the Benefits Review Board. Appeal from the Benefits Review Board's decision may be taken to the U.S. Court of Appeals and finally to the U.S. Supreme Court.

Compliance Assistance Available

To obtain additional information, contact the nearest OWCP District Office. Offices are listed in local telephone books under U.S. Government, Department of Labor, Office of Workers' Compensation Programs. Further assistance can be obtained from OWCP's Division of Longshore and Harbor Workers' Compensation (www.dol.gov/esa/owcp/dlhwc/lstable.htm).

Penalties/Sanctions

If any installment of compensation payable without an award is not paid within 14 days after it becomes due, an additional 10 percent will be added to the unpaid installment. OWCP can waive the additional 10 percent payment if the employer contacts OWCP and explains why the installment payment was late. The employer must also contact OWCP whenever it begins or suspends payments.

OWCP may suspend or revoke the authorization of any self-insurer. Failure by a self-insurer to comply with any provision or requirement of law or regulations, failure

or insolvency of the surety on his or her indemnity bond, or impairment of financial responsibility are deemed good causes for suspension or revocation.

Any employer who fails to secure coverage by authorized insurance carriers or by becoming an authorized self-insurer is subject, upon conviction, to a fine of not more than \$10,000, or by imprisonment for not more than one year, or both.

Any employer who discriminates against an employee may be subject to a penalty of not less than \$1,000 or more than \$5,000, and may be required to restore that employee to his or her employment along with all wages lost due to the discrimination unless that employee is no longer qualified to perform the duties of the employment.

Relation to State, Local and Other Federal Laws

Compensation benefits received under other state or federal compensation laws for the same injury are offset against benefits paid under the Act.

Family and Medical Leave

Family and Medical Leave Act of 1993 (FMLA) (29 USC §2601 *et seq.*; 29 CFR 825)

Who is Covered

The Family and Medical Leave Act (FMLA) provides a means for employees to balance their work and family responsibilities by taking unpaid leave for certain reasons. The Act is intended to promote the stability and economic security of families as well as the nation's interest in preserving the integrity of families.

The FMLA applies to any employer in the private sector who engages in commerce, or in any industry or activity affecting commerce, and who has 50 or more employees each working day during at least 20 calendar weeks in the current or preceding calendar year.

The law covers all public agencies (state and local governments) and local education agencies (schools, whether public or private). These employers do not need to meet the "50 employee" test. Title II of FMLA covers most federal employees, who are subject to regulations issued by the Office of Personnel Management.

To be eligible for FMLA leave, an individual must (1) be employed by a covered employer and work at a worksite within 75 miles of which that employer employs at least 50 people; (2) have worked at least 12 months (which do not have to be consecutive) for the employer; and (3) have worked at least 1,250 hours during the 12 months immediately before the date FMLA leave begins.

Basic Provisions/Requirements

The FMLA provides an entitlement of up to 12 weeks of job-protected, unpaid leave during any 12-month period for the following reasons:

- Birth and care of the employee's child, or placement for adoption or foster care of a child with the employee;
- Care of an immediate family member (spouse, child, parent) who has a serious health condition; or
- Care of the employee's own serious health condition.

If an employee was receiving group health benefits when leave began, an employer must maintain them at the same level and in the same manner during periods of FMLA leave as if the employee had continued to work. Usually, an employee may elect (or the employer may require) the use of any accrued paid leave (vacation, sick, personal, etc.) for periods of unpaid FMLA leave.

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Employees may take FMLA leave in blocks of time less than the full 12 weeks on an intermittent or reduced leave basis when medically necessary. Taking intermittent leave for the placement, adoption, or foster care of a child is subject to the employer's approval. Intermittent leave taken for the birth and care of a child is also subject to the employer's approval except for pregnancy-related leave that would be leave for a serious health condition.

When the need for leave is foreseeable, an employee must give the employer at least 30 days notice, or as much notice as is practicable. When the leave is not foreseeable, the employee must provide such notice as soon as possible.

An employer may require medical certification of a serious health condition from the employee's health care provider. An employer may also require periodic reports during the period of leave of the employee's status and intent to return to work, as well as "fitness-for-duty" certification upon return to work in appropriate situations.

An employee who returns from FMLA leave is entitled to be restored to the same or an equivalent job (defined as one with equivalent pay, benefits, responsibilities, etc.). The employee is not entitled to accrue benefits during periods of unpaid FMLA leave, but the employer must return him or her to employment with the same benefits at the same levels as existed when leave began.

Employers are required to post a notice for employees outlining the basic provisions of FMLA and are subject to a \$100 civil money penalty per offense for willfully failing to post such notice. Employers are prohibited from discriminating against or interfering with employees who take FMLA leave.

Employee Rights

The FMLA provides that eligible employees of covered employers have a right to take up to 12 weeks of job-protected leave in any 12-month period for qualifying events without interference or restraint from their employers. The FMLA also gives employees the right to file a complaint with the Wage and Hour Division, file a private lawsuit under the Act (or cause a complaint or lawsuit to be filed), and testify or cooperate in other ways with an investigation or lawsuit without being fired or discriminated against in any other manner.

Compliance Assistance Available

The Wage and Hour Division of the Employment Standards Administration administers FMLA. More detailed information, including copies of explanatory brochures, may be obtained by contacting the local Wage and Hour offices. In addition, the Wage and Hour Division has developed the **elaws** Family and Medical Leave Act Advisor (www.dol.gov/elaws), which is an online resource that answers a variety of commonly asked questions about FMLA, including employee eligibility, valid reasons for leave, notification responsibilities of employers and employees, and rights and benefits of employees. Compliance assistance information is also available from the Wage and Hour Division's Web site (www.wagehour.dol.gov).

Penalties/Sanctions

Employees and other persons may file complaints with the Employment Standards Administration (usually through the nearest office of the Wage and Hour Division). The Department of Labor may file suit to ensure compliance and recover damages if



a complaint cannot be resolved administratively. Employees also have private rights of action, without involvement of the Department of Labor, to correct violations and recover damages through the courts.

Relation to State, Local and Other Federal Laws

A number of states have family leave statutes. Nothing in the FMLA supersedes a provision of state law that is more beneficial to the employee, and employers must comply with the more beneficial provision. Under some circumstances, an employee with a disability may have rights under the Americans with Disabilities Act.

Lie Detector Tests

Employee Polygraph Protection Act of 1988 (EPPA) (29 USC §2001 *et seq.*; 29 CFR 801)

Who is Covered

The Employee Polygraph Protection Act (EPPA) applies to most private employers. The law does not cover federal, state and local governments.

Basic Provisions/Requirements

The EPPA prohibits most private employers from using lie detector tests, either for pre-employment screening or during the course of employment.

Employers generally may not require or request any employee or job applicant to take a lie detector test, or discharge, discipline, or discriminate against an employee or job applicant for refusing to take a test or for exercising other rights under the Act.

Employers may not use or inquire about the results of a lie detector test or discharge or discriminate against an employee or job applicant on the basis of the results of a test, or for filing a complaint, or for participating in a proceeding under the Act.

Subject to restrictions, the Act permits polygraph (a type of lie detector) tests to be administered to certain job applicants of security service firms (armored car, alarm, and guard) and of pharmaceutical manufacturers, distributors and dispensers.

Subject to restrictions, the Act also permits polygraph testing of certain employees of private firms who are reasonably suspected of involvement in a workplace incident (theft, embezzlement, etc.) that resulted in specific economic loss or injury to the employer.

Where polygraph examinations are allowed, they are subject to strict standards for the conduct of the test, including the pretest, testing and post-testing phases. An examiner must be licensed and bonded or have professional liability coverage. The Act strictly limits the disclosure of information obtained during a polygraph test.

Employee Rights

The EPPA provides that employees have a right to employment opportunities without being subjected to lie detector tests, unless a specific exemption applies. The Act also provides employees the right to file a lawsuit for violations of the Act. In addition, the Wage and Hour Division accepts complaints of alleged EPPA violations.

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Compliance Assistance Available

The Wage and Hour Division of the Employment Standards Administration administers and enforces the Act. More detailed information, including copies of explanatory brochures and regulatory and interpretative materials, may be obtained from the local Wage and Hour offices. Compliance assistance information may be found on the Wage and Hour Division's Web site (www.wagehour.dol.gov).

Penalties/Sanctions

The Secretary of Labor can bring court action to restrain violators and assess civil money penalties up to \$10,000 per violation. An employer who violates the law may be liable to the employee or prospective employee for legal and equitable relief, including employment, reinstatement, promotion and payment of lost wages and benefits.

Any person against whom a civil money penalty is assessed may, within 30 days of the notice of assessment, request a hearing before an administrative law judge. If dissatisfied with the administrative law judge's decision, such person may request a review of the decision by the Secretary of Labor. Final determinations on violations are enforceable through the courts.

Relation to State, Local and Other Federal Laws

The law does not preempt any provision of any state or local law or any collective bargaining agreement that is more restrictive with respect to lie detector tests.

Whistleblower Protection Provisions Enforced By OSHA

The Occupational Safety and Health Administration (OSHA) administers the employee protection (or “whistleblower”) provisions of fourteen statutes.

Occupational Safety & Health Act (OSH Act) (29 USC § 660(c))

Surface Transportation Assistance Act (STAA) (49 USC § 31105)

Asbestos Hazard Emergency Response Act (AHERA)
(15 USC § 2651)

International Safety Container Act (ISCA) (46 USC App. § 1506)

Energy Reorganization Act of 1974 (ERA) (42 USC § 5851)

Clean Air Act (CAA) (42 USC § 7622)

Safe Drinking Water Act (SDWA) (42 USC § 300j-9(i))

Federal Water Pollution Control Act (FWPCA) (33 USC § 1367)

Toxic Substances Control Act (TSCA) (15 USC § 2622)

Solid Waste Disposal Act (SWDA) (42 USC § 6971)

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 USC § 9610)

Wendell H. Ford Aviation Investment and Reform Act (AIR21)
(49 USC § 42121)

Sarbanes–Oxley Act (SOA) (18 USC § 1514A)

Pipeline Safety Improvement Act (PSIA) (49 USC § 60129)

Who is Covered

Under the OSH Act, employees who believe that their employer has discriminated or retaliated against them for raising or reporting safety or health concerns may file a complaint with OSHA. Under the STAA, employees in the trucking industry may file complaints with OSHA if they believe that their employer has discriminated against them for reporting safety concerns or for refusing to drive under dangerous circumstances or in violation of safety rules.

Similarly, under the other statutes, employees also may file complaints with OSHA if they believe that their employer has discriminated against them for reporting protected safety concerns involving the airline or pipeline industries, for reporting protected environmental concerns including asbestos in schools, or for reporting potential securities fraud.

The Department of Labor also enforces the anti-retaliation provisions of several other statutes that are not administered by OSHA. Information concerning many of these additional anti-retaliation statutes is available in other sections of the *Guide* describing the statutes enforced by different Department agencies, such as the Wage and Hour Division, the Employee Benefits Security Administration, and the Mine Safety and Health Administration.

Basic Provisions/Requirements

Generally, the employee protection provisions listed above prohibit an “employer” or any “person” (the definition of which may vary from statute to statute) from discharging or otherwise discriminating against any employee with respect to the employee’s compensation, terms, conditions, or privileges of employment because the employee engaged in specified “protected” activities.

The protected activities typically include: (1) initiating a proceeding under, or for the enforcement of, any of these statutes, or causing such a proceeding to be initiated; (2) testifying in any such proceeding; (3) assisting or participating in any such proceeding or in any other action to carry out the purposes of these statutes; or (4) complaining about a violation.

The ERA, the AIR21, the SOA, and the PSIA specifically cover an employee’s internal complaints to his or her employer, and it is the Secretary’s position, as set forth in regulations, that employees who express safety or quality assurance concerns internally to their employers are protected under the other whistleblower statutes. With the exception of the Fifth Circuit, the courts of appeals that have considered whether internal complaints are protected have agreed with the Secretary.

Employee Rights

An employee who believes that he or she has been discriminated against in violation of any of the statutes listed above may file a complaint with OSHA. Complaints must be filed within 30 days after the occurrence of the alleged violation under the OSH Act, the CAA, the CERCLA, the SWDA, the FWPCA, the SDWA, and the TSCA; within

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60 days under the ISCA; within 90 days under the AIR21, the SOA, and the AHERA; and within 180 days under the STAA, the ERA, and the PSIA. Under the SOA, if the Secretary has not issued a final decision within 180 days of the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the employee, the employee may bring an action at law or equity in district court.

Compliance Assistance Available

More detailed information, including copies of regulatory and interpretative materials, may be obtained from the nearest OSHA office. Addresses and telephone numbers for these offices are set forth in local directories and on OSHA's Web site (www.osha.gov).

Investigations/Penalties/Sanctions

Upon receipt of a timely complaint, OSHA notifies the employer and, if conciliation fails, conducts an investigation. Where OSHA finds that complaints filed under the OSH Act, the AHERA, and the ISCA have merit they are referred to the Solicitor's Office for legal action. Complaints under these three statutes found not to have merit will be dismissed.

Where OSHA finds a violation after investigating complaints under the other statutes listed above, it will issue a determination letter requiring the employer to pay back wages, reinstate the employee, reimburse the employee for attorney's and expert witness fees, and take other steps to provide necessary relief. Complaints found not to have merit will be dismissed.

Parties who object to OSHA's determinations under the statutes listed above (except for the OSH Act, the AHERA, and the ISCA) may request a hearing before the Department of Labor's Office of Administrative Law Judges (OALJ) (www.oalj.dol.gov). Judges' decisions are reviewed by the Department of Labor's Administrative Review Board (www.dol.gov/arb), which the Secretary has designated to issue final agency decisions.

Under the STAA, if OSHA finds in favor of the employee, litigation usually is conducted by the Solicitor's Office, but sometimes by the employee. Under the other statutes, litigation generally is conducted by the private parties themselves. Employers and employees may seek judicial review of an adverse ARB decision.

Under the AIR21, the SOA, and the PSIA, employees who file complaints frivolously or in bad faith may be liable for attorney's fees up to \$1,000.

Relation to State, Local and Other Federal Laws

The Supreme Court has held that the employee protection provisions of the Energy Reorganization Act do not preempt existing state statutes and common law claims. The other statutes listed above should be consulted separately to determine whether or not their employee protection provisions are supplementary to protections provided by state laws.

Plant Closings and Mass Layoffs

Worker Adjustment and Retraining Notification Act (WARN) (29 USC §2101 *et seq.*; 20 CFR 639)

Who is Covered

The Worker Adjustment and Retraining Notification Act (WARN) generally covers employers with 100 or more employees, not counting those who have worked less than six months in the last 12 months and those who work an average of less than 20 hours a week. Regular federal, state and local government entities that provide public services are not covered. Employees entitled to notice under WARN include managers and supervisors as well as hourly and salaried workers.

Basic Provisions/Requirements

WARN protects workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice gives workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain other jobs and, if necessary, to enter skill training or retraining that will allow these workers to compete successfully in the job market. WARN also provides for notice to state dislocated worker units so that they can promptly offer dislocated worker assistance.

A covered plant closing occurs when a facility or operating unit is shut down for more than six months, or when 50 or more employees lose their jobs during any 30-day period at a single site of employment. A covered mass layoff occurs when a layoff of six months or longer affects either 500 or more workers or at least 33 percent of the employer's workforce when the layoff affects between 50 and 499 workers. The number of affected workers is the total number laid off during a 30-day (or in some cases 90-day) period.

WARN does not apply to closure of temporary facilities, or the completion of an activity when the workers were hired only for the duration of that activity. WARN also provides for less than 60 days notice when the layoffs resulted from closure of a faltering company, unforeseeable business circumstances, or a natural disaster.

Employee Rights

Workers, or their representatives, and units of local government may bring individual or class action suits. U.S. district courts enforce WARN requirements. The Court may allow reasonable attorney's fees as part of any final judgment.

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Compliance Assistance Available

For general information about WARN, a fact sheet can be seen on the Employment and Training Administration's Web site (www.doleta.gov/programs/factshtwarn). Specific requirements of WARN may be found in the Act itself, Public Law 100-379 (29 USC 2101 *et seq.*) The Department published final regulations on April 20, 1989 in the *Federal Register*, pages 16042 to 16070 (Vol. 54, No. 75). The regulations appear at 20 CFR Part 639. A copy of the Act and regulations may be obtained from the U.S. Department of Labor, Employment and Training Administration, Office of Adult Services, Division of Adults and Dislocated Workers, Room C-5325, 200 Constitution Avenue NW, Washington, DC 20210. The telephone number is 202-693-3580.

Penalties/Sanctions

An employer who violates the WARN provisions is liable to each employee for an amount equal to back pay and benefits for the period of the violation, up to 60 days. This may be reduced by the period of any notice that was given, and any voluntary payments that the employer made to the employee.

An employer who fails to provide the required notice to the unit of local government is subject to a civil penalty not to exceed \$500 for each day of violation. The employer may avoid this penalty by satisfying the liability to each employee within three weeks after the closing or layoff.

Relation to State, Local and Other Federal Laws

WARN does not preempt any other federal, state or local law, or any employer/employee agreement that requires other notification or benefit. Rather, the rights provided by WARN supplement those provided by other federal, state or local laws.

Union Members

The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), as amended (29 USC §401 *et seq.*; 29 CFR 401- 453)

Who is Covered

The Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA), directly affects millions of people throughout the U.S. The LMRDA covers unions, officers and employees of unions, union members, employees who work under collective bargaining agreements (even if they are not union members), employers, labor relations consultants, surety companies, trusts in which a union is interested, and other “persons” as defined in the LMRDA who may be covered by particular provisions of the Act.

LMRDA also covers unions representing U.S. Postal Service employees by virtue of the Postal Reorganization Act of 1970. Section 7120 of the Civil Service Reform Act, and its implementing regulations, apply many LMRDA standards to unions representing employees in most agencies of the executive branch of the federal government. LMRDA does not cover unions composed solely of state and local government employees.

Basic Provisions/Requirements

The LMRDA consists of seven titles:

- **Title I**, the “Bill of Rights”, sets forth certain basic rights that Congress believed federal law should guarantee to union members. Members may enforce these rights through private suit in federal district court. Section 104 of the LMRDA, which establishes the right to receive or examine collective bargaining agreements, applies not only to union members but also to all nonunion employees whose rights are directly affected by a collective bargaining agreement.

The Secretary of Labor also has enforcement responsibilities with regard to Section 104. The Office of Labor-Management Standards (OLMS) of the Employment Standards Administration handles these responsibilities.

- **Title II** requires unions to file an information report (Form LM-1), copies of their constitution and bylaws, and annual financial reports (Form LM-2, LM-3, or LM-4) with OLMS. The reports and documents filed with OLMS are public information, and any person may examine them or obtain copies at OLMS offices.

Officers and employees of unions must file a Form LM-30 with OLMS if they have any loans or benefits from, or certain financial interests in, employers whose employees their union represents and businesses that deal with their union.

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Labor relations consultants who enter into an agreement with an employer to persuade employees about their union activities, or to supply certain information to the employer, must file a Form LM-20, Agreement and Activities Report, and a Form LM-21, Receipts and Disbursements Report.

Employers who enter into such an agreement or engage in certain specified financial dealings with their employees, unions, union officers, or labor relations consultants must file a Form LM-10.

Finally, surety companies that issue bonds required by the LMRDA or the Employee Retirement Income Security Act of 1974 (ERISA) must file a Form S-1 to report data such as premiums received, total claims paid, and amounts recovered. The Secretary of Labor has authority to enforce the reporting requirements of the Act.

- **Title III** concerns the imposition of trusteeships over subordinate unions. A parent union may impose a trusteeship only for a purpose specified in the LMRDA, and it must establish and administer the trusteeship in accordance with its own constitution and bylaws. A parent union that places a subordinate union in trusteeship must file initial, semiannual, and terminal trusteeship reports (Forms LM-15, LM-15A, and LM-16).

Under the LMRDA, the parent union may not engage in certain specified acts involving the funds and delegate votes from a union under trusteeship. The Secretary of Labor has the authority to investigate and enforce alleged violations of Title III, and a union member or subordinate union may also enforce the provisions of this title, except for the reporting requirements, through private suit in federal district court.

- **Title IV** establishes standards for elections of union officers. Local unions must elect their officers by secret ballot; national and international unions and intermediate bodies must elect their officers either by secret ballot of the members or by delegates chosen by secret ballot. Title IV requires elections to be held by national and international unions at least every five years, intermediate bodies at least every four years, and local unions at least every three years.

Unions and employers may not use their funds to promote the candidacy of any candidate, although union funds may be used to conduct an election. A union member in good standing has the right to nominate candidates, be a candidate subject to reasonable qualifications uniformly imposed, hold office, and support and vote for the candidates of the member's choice. Unions must mail a notice of election to every member at the member's last-known home address at least 15 days before the election.

A union member who has exhausted internal election remedies, or invoked such remedies without obtaining a final decision within three calendar months, may file a complaint with the Secretary within one calendar month thereafter, alleging a violation of Title IV of the LMRDA. The Secretary of Labor has authority to file suit in a federal district court to set aside an invalid union election and to request a new election under the supervision of the Secretary.

- **Title V** provides a number of safeguards for unions. Union officers have a duty to manage the funds and property of the union solely for the benefit of the union in accordance with its constitution and bylaws. A union may not have outstanding loans to any one officer or employee that exceed \$2,000. Union officials who handle union funds or property must be bonded to provide protection against losses.

A union officer or employee who embezzles or otherwise misappropriates union funds or other assets commits a federal crime punishable by a fine and/or imprisonment. Persons convicted of certain crimes, including a violation of Title II or III of the LMRDA, may not hold union office or employment for up to 13 years after conviction or the end of imprisonment.

- **Title VI** includes the authority to investigate (see “Authority to Investigate and Penalties” below); a prohibition on a union fining, suspending, expelling, or otherwise disciplining members for exercising their rights under the LMRDA; and a prohibition on the use or threat of force or violence to interfere with a union member in the exercise of LMRDA rights.
- **Title VII** amends the Labor Management Relations Act (LMRA), otherwise known as the Taft–Hartley Act, concerning strikes, boycotts, and picketing. The National Labor Relations Board (NLRB), an independent federal agency, administers the LMRA.

Employee Rights

Title I of the LMRDA guarantees certain rights to all union members. These include the right to nominate candidates, to vote in elections or referendums, to attend membership meetings and to participate in the deliberations and vote upon the business of such meetings, subject to reasonable rules and regulations in the organization’s constitution and bylaws.

They also include the right to meet and assemble freely with other members, to express any views, arguments, or opinions, and to express views at meetings about candidates in an election of the labor organization or about any business properly before the meeting, subject to the organization’s established and reasonable rules pertaining to the conduct of meetings. Additional rights outlined in Title I address dues, initiation fees and assessments, protection of the right to sue, and safeguards against improper disciplinary action.

Compliance Assistance Available

Additional compliance assistance materials appear on the OLMS Home Page (www.dol.gov/esa/olms_org.htm). OLMS field office staff members are available to answer questions about the LMRDA and to help individuals and organizations affected by the law.

The OLMS National Office Public Disclosure Room has copies of all reports and documents filed with OLMS, and OLMS field offices have copies of reports filed by organizations and individuals located within their jurisdictions. Copies of Form LM-1, LM-2, LM-3, and LM-4 reports filed by unions may be ordered on OLMS’s Web site (www.dol.gov/esa/regs/compliance/olms/rrlo/orders.htm).

In addition, all OLMS field offices as well as the OLMS National Office have blank reporting forms and instructions as well as explanatory pamphlets about the law.

Penalties/Sanctions

The LMRDA authorizes the Secretary of Labor to investigate “in order to determine whether any person has violated or is about to violate” any provisions of the Act (except the Bill of Rights of Union Members and amendments made by the LMRDA to other laws), and to “enter such places and inspect such records and accounts and

question such persons” as may be necessary to determine whether a violation has occurred. The Secretary may issue subpoenas to compel testimony or to obtain records and other materials needed to complete an investigation.

The Secretary may file civil actions in federal district court to restrain or correct violations and to bring about compliance with the LMRDA. The embezzlement of union funds is subject to a fine of up to \$250,000 and/or imprisonment up to five years. Criminal penalties also apply to other Title V provisions as well as to certain reporting violations under Titles II and III.

Relation to State, Local and Other Federal Laws

Federal laws related to the LMRDA include the National Labor Relations Act of 1935; the Taft–Hartley Act of 1947; the Racketeer-Influenced and Corrupt Organizations (RICO) Act; the Service Contract Act; and the Civil Service Reform Act of 1978.

Uniformed Service Members

Uniformed Services Employment and Reemployment Rights Act (USERRA) (38 USC §§4301 through 4333)

Who is Covered

The Uniformed Services Employment and Reemployment Rights Act (USERRA) was signed on October 13, 1994. The Act applies to persons who perform duty, voluntarily or involuntarily, in the “uniformed services,” which include the Army, Navy, Marine Corps, Air Force, Coast Guard, and Public Health Service commissioned corps, as well as the reserve components of each of these services. Federal training or service in the Army National Guard and Air National Guard also gives rise to rights under USERRA. In addition, under the Public Health Security and Bioterrorism Response Act of 2002, certain disaster response work (and authorized training for such work) is considered “service in the uniformed services” as well.

Uniformed service includes active duty, active duty for training, inactive duty training (such as drills), initial active duty training, and funeral honors duty performed by National Guard and reserve members, as well as the period for which a person is absent from a position of employment for the purpose of an examination to determine fitness to perform any such duty.

USERRA covers nearly all employees, including part-time and probationary employees. USERRA applies to virtually all U.S. employers, regardless of size.

Basic Provisions/Requirements

The pre-service employer must reemploy service members returning from a period of service in the uniformed services if those service members meet five criteria:

- The person must have held a civilian job;
- The person must have given notice to the employer that he or she was leaving the job for service in the uniformed services, unless giving notice was precluded by military necessity or otherwise impossible or unreasonable;
- The cumulative period of service must not have exceeded five years;
- The person must not have been released from service under dishonorable or other punitive conditions; and
- The person must have reported back to the civilian job in a timely manner or have submitted a timely application for reemployment.

USERRA establishes a five-year cumulative total on military service with a single employer, with certain exceptions allowed for situations such as call-ups during emergencies, reserve drills and annually scheduled active duty for training.

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USERRA also allows an employee to complete an initial period of active duty that exceeds five years (e.g., enlistees in the Navy's nuclear power program are required to serve six years).

Employee Rights

Under USERRA, restoration rights are based on the duration of military service rather than the type of military duty performed (e.g., active duty for training or inactive duty), except for fitness-for-service examinations. The time limits for returning to work are as follows:

- Less than 31 days service: By the beginning of the first regularly scheduled work period after the end of the calendar day of duty, plus time required to return home safely and an eight hour rest period. If this is impossible or unreasonable, then as soon as possible.
- 31 to 180 days: The employee must apply for reemployment no later than 14 days after completion of military service. If this is impossible or unreasonable through no fault of the employee, then as soon as possible.
- 181 days or more: The employee must apply for reemployment no later than 90 days after completion of military service.
- Service-connected injury or illness: Reporting or application deadlines are extended for up to two years for persons who are hospitalized or convalescing.

USERRA guarantees pension plan benefits that accrued during military service, regardless of whether the plan is a defined benefit plan or a defined contribution plan. Also, USERRA provides health benefits continuation for service members and their families during military service for up to 18 months. In addition, USERRA prohibits employment discrimination against a person on the basis of past military service, current military obligations, or an intent to serve.

Compliance Assistance Available

The Veterans' Employment and Training Service (VETS) enforces USERRA. However, the law also allows an employee to enforce his or her rights by filing a court action directly, without filing a complaint with VETS.

VETS has published a fact sheet (OASVET 97-3) about USERRA. Copies of this and/or other VETS' publications, or answers to questions about USERRA, may be obtained from the local VETS office. The **elaws** Uniformed Services Employment and Reemployment Rights Act (USERRA) Advisor (www.dol.gov/elaws) helps veterans understand employee eligibility and job entitlements, employer obligations, benefits and remedies under the Act. VETS has also published a non-technical USERRA Guide that contains general information about the law. Information on USERRA and other VETS programs may be found on the VETS Web site (www.dol.gov/vets).

Penalties/Sanctions

A court may order an employer to compensate a prevailing claimant for lost wages or benefits. USERRA allows for liquidated damages for "willful" violations.

Relation to State, Local and Other Federal Laws

USERRA does not preempt state laws providing greater or additional rights, but it does preempt state laws providing lesser rights or imposing additional eligibility criteria.

Authorized Workers

Immigration and Reform and Control Act of 1986 (IRCA) (8 USC 1101 as amended) Immigration and Nationality Act, Section 274A

Who is Covered

The Immigration and Nationality Act (INA) includes provisions addressing employment eligibility, employment verification and nondiscrimination. These provisions apply to all employers.

Basic Provisions/Requirements

Under IRCA, employers may hire only persons who may legally work in the U.S. (i.e., citizens and nationals of the U.S. and aliens authorized to work in the U.S.). The employer must verify the identity and employment eligibility of anyone to be hired, which includes completing the Employment Eligibility Verification Form (I-9). Employers must keep each I-9 on file for at least three years, or one year after employment ends, whichever is longer.

Employee Rights

The INA protects U.S. citizens and aliens authorized to accept employment in the U.S. from discrimination in hiring or discharge on the basis of national origin and citizenship status.

Compliance Assistance Available

More detailed information, including copies of explanatory brochures and regulatory and interpretative materials, may be obtained from local offices of the Employment Standards Administration's Wage and Hour Division (www.wagehour.dol.gov) and the Office of Federal Contract Compliance Programs (www.dol.gov/esa/ofccp).

Penalties/Sanctions

Employers who fail to complete and/or retain the I-9 forms are subject to penalties. The Immigration and Naturalization Service (INS) enforces the INA requirements on verification of employment eligibility. The Justice Department enforces the anti-discrimination provisions. As part of their ongoing enforcement efforts, the ESA's Wage and Hour Division and Office of Federal Contract Compliance Programs conduct inspections of the I-9 forms. They report their findings to the INS and to the Department of Justice where disparate treatment or unauthorized employment is apparent.

Relation to State, Local and Other Federal Laws

Not applicable.

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Temporary Agricultural Workers (H-2A Visas)

Section 218 of the Immigration and Nationality Act of 1952 (INA), as amended (8 USC §§1101, 1184, and 1188; 20 CFR 655, subpart B, and 29 CFR, part 500)

Who is Covered

The Immigration and Nationality Act (INA) covers agricultural employers seeking to hire temporary agricultural workers under H-2A visas.

Basic Provisions/Requirements

Employers may not import a foreign worker under an H-2A visa unless they have applied to the Employment and Training Administration (ETA) for certification that: (1) there are not sufficient workers who are able, willing, qualified and available to perform the work; and (2) the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed workers in the U.S.

To receive a timely determination, an employer must apply for a temporary labor certification at least 45 days before the date of need. The employer should file the application with both the appropriate ETA regional office and the office of the State Workforce Agency (SWA) serving the geographic areas where the foreign workers will be employed.

ETA's jurisdiction includes whether the employer conducted positive recruitment, whether a strike or lockout was in progress, whether the employer will provide workers' compensation insurance, whether adequate housing is available, what the prevailing wage rates are, and other similar matters. The regulations addressing issuance and denial of labor certification for temporary, nonimmigrant foreign workers are found at 20 CFR 655, subpart B.

The procedures for obtaining a labor certification and the contractual obligations of employers are summarized below. Additional information may be found at www.ows.doleta.gov. Under "Foreign Labor", select the H-2A certification link.

Recruitment of U.S. Workers. Any employer who applies for certification of H-2A job opportunities must first attempt to recruit U.S. workers to fill these openings. After H-2A workers are recruited, employers must continue to engage in "positive recruitment" of U.S. workers. SWAs continue active recruitment, but positive recruitment stops when workers depart for the place of employment.

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In addition, after the H-2A workers have begun work, the employer must agree to accept U.S. workers until 50 percent of the certified contract period has passed.

Rates of Pay. In every H-2A employment situation, the employer must agree to pay all workers employed in certified jobs either (1) the Adverse Effect Wage Rate (AEWR); (2) the Prevailing Rate for a given crop/area; or (3) the legal state minimum wage, whichever is higher. None of these rates may be less than the federal minimum wage, which is \$5.15 an hour.

The U.S. Department of Agriculture (USDA) establishes the AEWR, which is an annual weighted average hourly rate for field and livestock workers (combined) for nineteen USDA regions. Prevailing wages may be calculated on the basis of hourly or “piece” rates of pay. However computed, they must not be less than the rate specified in the job offer/worker contracts.

Job Clearance Order/Worker Contracts. The employer must provide every worker a copy of the worker contract or, as a substitute for the worker contract, a copy of the clearance order. If worker contracts are provided, they must specify at least those benefits required by the regulations. The job clearance order is the “official” document, since it is the one the employer submits and the Department of Labor approves. The job clearance order/contract must state:

- The beginning and ending dates of the contract period;
- Any and all significant conditions of employment, such as payment for transportation expenses incurred, housing and meals to be provided (and related charges), specific days workers are not required to work (i.e., Sabbath, federal holidays);
- The hours per day and the days per week each worker will be expected to work during the contract period;
- The crop(s) to be worked and rate(s) for each crop/job;
- The rate(s) of pay for each job to be performed;
- Any tools required, with an indication that employer pays for them; and
- Verification that workers’ compensation insurance will be provided according to the law of the state where work is performed.

Guarantees to All Workers. Employers certified for H-2A contracts must agree to provide each worker an offer of employment for at least 75 percent of the hours in the contract period. Such an offer is called the “three-fourths guarantee.” For example, in a contract for a 10-week period, during which a normal workweek is specified as six days a week, eight hours per day, the worker would have to be guaranteed employment for at least 360 hours (i.e., 10 weeks x 48 hours per week = 480 hours x 75% = 360 hours).

Wages for the guaranteed 75 percent period would be calculated at not less than the average hourly piece rate or the AEWR for the state in which the work was done, whichever is higher.

Transportation Costs/Reimbursement. Every non-local worker employed on an H-2A contract is entitled to be paid for all transportation costs related to travel from the place where the worker was recruited to the job site, and then back to the worker’s area of residence. Both foreign and U.S. workers are entitled to such payments. Workers are defined as “non-local” if they cannot reasonably return to their permanent residence every night. Employers must reimburse expenses according to the following schedule:

- For transportation to the place of employment, the employer must repay the worker when 50 percent of the contract period has been completed.
- For transportation “home,” the worker must complete the agreed-upon contract period. The employer has no obligation to pay return expenses if an employee abandons the employment unless some special provision in the worker’s contract provides otherwise.

Records Required: Employers certified for H-2A contracts must keep records of the hours each worker actually works. In addition, the employer must retain a record of time “offered” to the worker but which the worker “refused” to work. Each worker must receive a wage statement showing hours of work, hours refused, pay for each type of crop, the basis of pay (i.e., whether the worker is being paid by the hour, by the piece, “task” pay, etc.). The wage statement must indicate total earnings for the pay period and all deductions from wages (along with a statement as to why deductions were made).

Termination of Workers. Employers must maintain records on any worker who abandons employment, either voluntarily or involuntarily. To negate a continuing liability for wages and benefits to workers, the employer must notify the local Job Service of the SWA in writing within 48 hours of either termination or abandonment of employment. The report should state the date of the termination/abandonment and the reason for it. The employer should also state if it will seek to replace such workers.

Employee Rights

H-2A workers can file complaints about H-2A labor standards. ETA or any SWA will forward any complaint received about contractual H-2A labor standards between the employer and the employee to the local Wage and Hour office for appropriate action.

Compliance Assistance Available

Information on how to apply for a temporary labor certification, including application forms and directives, may be obtained from the SWAs. The SWA staffs can help employers fill out applications, place agricultural clearance orders, and provide advice on possible recruitment sources.

Copies of the application forms, regulations and relevant directives may also be obtained from ETA regional offices (1-877-US-2JOBS). Copies of Wage and Hour publications may be obtained from the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor, Wage and Hour Division.

Penalties/Sanctions

The Wage and Hour Division of the Employment Standards Administration is responsible for ensuring that employers comply with all contractual and regulatory provisions that apply to the employment of H-2A workers under Section 218 of the INA. The regulations addressing enforcement by the Wage and Hour Division are found at 29 CFR part 501.

Relation to State, Local and Other Federal Laws

Foreign workers employed under the H-2A program are not covered under the Migrant and Seasonal Agricultural Worker Protection Act.

Temporary Nonagricultural Workers (H-2B Visas)

Sections 101(a)(15)(H)(ii)(b) and 214(c)(1) and (g)(1) of the Immigration Act of 1952, as amended and Section 8 CFR 214.2(h)(6)

Who is Covered

The regulations of the Immigration and Naturalization Service (INS), 8 CFR 214.2(h)(6), apply to employers who wish to import temporary nonagricultural workers classified under Section 101(a)(15)(H)(ii)(b) to work in temporary jobs in the U.S. Section 214(c)(1) of the Immigration and Nationality Act (INA) requires the Attorney General to consult with the Department of Labor before determining whether any worker can be admitted under Section 101(a)(15)(H)(ii)(b). Section 214(g)(1) of the INA provides that the number of aliens who can be issued visas or provided nonimmigrant status under Section 101(a)(15)(H)(ii)(b) cannot exceed 66,000.

Basic Provisions/Requirements

INS regulations require that employers who file H-2B petitions with the INS (except for temporary employment on Guam) must include an advisory certification from the Department of Labor stating that qualified workers are not available in the U.S. and that the foreign worker's employment will not adversely affect wages and working conditions of similarly employed U.S. workers. Absent such a document, the employer must submit a statement detailing the reasons why certification cannot be made.

Employers must file applications for certification of temporary nonagricultural jobs on Part A of an Application for Alien Employment Certification, Form ETA 750 (www.workforcesecurity.doleta.gov/foreign/750inst.asp), with the State Workforce Agency (SWA) serving the geographic area where the alien will work. To receive a timely determination, the employer should apply at least 60 but no more than 120 days before the workers are needed.

The employment for which certification is requested must be for less than one year, and the need for the service or labor shall be a one-time occurrence, seasonal need, peak load need, or intermittent need. As part of the application packet, the employer must submit a statement explaining how the request meets the above stated criteria. General Administrative Letter No. I-95, dated November 10, 1994, states the requirements for obtaining temporary nonagricultural labor certifications. This letter may be viewed at www.workforcesecurity.doleta.gov, under the topic "Directives/Advisories."

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Other detailed information may also be found at www.workforcesecurity.doleta.gov. Under “Foreign Labor”, select the link for H-2B certification.

After receiving an application, the SWA prepares a job order and places it into the Employment Service System for 10 days. The employer, after filing the application with the SWA, advertises the job opportunity in a newspaper of general circulation for three consecutive days, or in a professional, trade, or ethnic publication, whichever is most appropriate for the occupation and most likely to bring responses from U.S. workers.

The employer must also document that unions and other recruitment sources, appropriate for the occupation and customary to the industry, could not refer qualified U.S. workers. After the employer completes the required recruitment, it must submit a recruitment report that explains the lawful job-related reasons for not hiring each U.S. worker that applied.

Employee Rights

Worker-protection provisions that apply to U.S. workers (e.g., the Fair Labor Standards Act) cover nonimmigrant H-2B workers. Workers may file complaints with the local Wage and Hour Offices.

Compliance Assistance Available

Employers may obtain information on how to apply for a temporary nonagricultural labor certification, including application forms and directives that contain prescribed procedural requirements, from the SWAs or regional offices of the Employment and Training Administration (1-877-US-2JOBS). SWA staffs can help employers fill out application forms, place job orders, and draft advertisements that meet prescribed requirements.

Penalties/Sanctions

There are no enforcement provisions specific to this program.

Relation to State, Local and Other Federal Laws

Various other laws, such as workers’ compensation, tax (unemployment insurance, local, state and federal) and the Family and Medical Leave Act, may apply to the employment of these workers.

Workers in Professional and Specialty Occupations (H-1B Visas)

The Immigration and Nationality Act (INA) as amended by The Immigration Act of 1990 (IMMACT) and Others (H-1B program) (8 USC §1101(a)(15)(I)(b), 1182(n), 1184(c); 20 CFR 655 subparts H and I)

Who is Covered

The H-1B program applies to employers seeking to hire nonimmigrant aliens as workers in specialty occupations or as fashion models using the H-1B nonimmigrant visa classification.

Basic Provisions/Requirements

The Immigration and Nationality Act (INA) allows employment of foreign workers in certain specialty occupations (generally those requiring a bachelor's degree or its equivalent). Foreign workers such as engineers, teachers, computer programmers, medical doctors, and physical therapists may be employed under the H-1B visa classification, as may fashion models of distinguished merit and ability.

The INA sets forth procedures for employers wishing to employ H-1B nonimmigrant workers. To obtain H-1B status approval, the employer must first file a Labor Condition Application (LCA), Form ETA 9035 or ETA 9035E, with the Department of Labor. The employer must state that it will:

- Pay the nonimmigrant workers at least the local prevailing wage or the employer's actual wage, whichever is higher; pay for non-productive time in certain circumstances; and offer benefits on the same basis as for U.S. workers;
- Provide working conditions for nonimmigrant workers that will not adversely affect the working conditions of workers similarly employed;
- *Not* employ an H-1B nonimmigrant worker at a location where a strike or lockout in the occupational classification is occurring, and notify the Employment and Training Administration (ETA) of any future strike or lockout; and
- On or within 30 days before the date the LCA is filed with ETA, provide notice of the employer's intent to hire H-1B workers. The employer must provide this notice to the bargaining representative of workers in the occupation in which the H-1B nonimmigrant worker will be employed. If there is no bargaining representative, the employer must post such notices in conspicuous locations at the intended place(s) of employment, or provide them electronically.

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Additional rules apply to H-1B dependent employers. Such an employer is, roughly, one whose total workforce is made up of enough H-1B workers that they comprise 15% of the employer's total workforce. (Different thresholds apply to smaller employers.) H-1B dependent employers who wish to hire only H-1B workers who are paid at least \$60,000 per year or have a master's degree or higher in a specialty related to the employment can be exempted from these additional elements.

H-1B dependent employers and willful violator employers must attest to the following three elements addressing non-displacement and recruitment of U.S. workers:

- The employer will not displace any similarly employed U.S. worker within 90 days before or after applying for H-1B status, or an extension of status for any H-1B worker;
- The employer will not place any H-1B worker employed pursuant to the LCA at the worksite of another employer *unless* the employer applicant first makes a bona fide inquiry as to whether the other employer has displaced or intends to displace a similarly employed U.S. worker within 90 days before or after the placement of the H-1B worker; and
- The employer, before applying for H-1B status for any H-1B worker pursuant to the LCA, took or will take good faith steps to recruit U.S. workers for the job the nonimmigrant is sought, at wages as least equal to those offered to the H-1B worker. Also, the employer will offer the job to any U.S. worker who applies and is equally or better qualified than the H-1B worker. This attestation does not apply if the H-1B worker is a "priority worker" within the meaning of Section 203(b)(1)(A), (B), or (C) of the INA.

After the Department of Labor certifies the LCA, the employer will apply to the Immigration and Naturalization Service (INS) for approval to employ an individual under H-1B status so that foreign workers may be hired.

Employee Rights

H-1B workers are granted a number of important rights. The employer must give the worker a copy of the LCA. The employer must pay the worker at least the same wage rate as paid to other employees with similar experience and qualifications or the local prevailing wage for the occupation in the area of employment, whichever is higher. The employer must pay for non-productive time caused by the employer or by the worker's lack of a license or permit. The employer must offer the worker fringe benefits on the same basis as other employees.

Also, the employer must not force or allow the worker to pay, either directly or indirectly, any part of the \$1,000 application fee that the employer must pay to the INS when submitting the H-1B visa application. The employer may not require the worker to pay a financial penalty for leaving employment prior to a date set in the employment contract. However, this restriction does not preclude the employer from seeking "liquidated damages" pursuant to relevant state law. Liquidated damages are generally estimates stated in the contract of the anticipated damages to the employer caused by the worker's breach of contract.

U.S. workers and job applicants may also have certain H-1B rights. U.S. workers employed directly by an H-1B dependent or willful violator employer have the right not to be displaced by an H-1B worker. This protection applies to displacement within 90 days before or after the employer files the INS petition requesting approval to employ the individual in the H-1B status. Also, the protection applies only to individuals employed in a job essentially equivalent to the one for which the H-1B worker was sought.

An H-1B dependent and willful violator employer may also be liable if it places an H-1B worker at another employer's worksite and a U.S. worker employed by the other employer is displaced from an essentially equivalent job. This provision applies to a period 90 days before or after the H-1B worker is placed at the worksite.

U.S. job applicants generally have a right to be recruited for jobs with H-1B dependent and willful violator employers and offered the job if they are equally or better qualified than the H-1B worker being sought. The U.S. Department of Justice has the authority to investigate complaints of failure to hire U.S. workers.

The non-displacement, recruitment, and hiring provisions apply only to an LCA and petition that reflect that the employer is an H-1B-dependent or willful violator employer and does not state that the workers being petitioned are exempt.

No employer of H-1B workers may intimidate, threaten, blacklist, discharge, or in any other manner discriminate against any employee, former employee, or job applicant for disclosing violations of H-1B provisions or for cooperating in an official investigation of the employer's compliance.

U.S. workers and H-1B workers may also examine the public disclosure documents that the employer is required to maintain that provide information about the employer's compliance with the attestation elements.

Compliance Assistance Available

Information on filing and processing LCAs may be found at www.ows.doleta.gov. Links to the *Federal Register* that contain detailed technical regulations controlling the H-1B program, as well as non-technical H-1B information, may be found at www.workforcsecurity.doleta.gov/foreign/h-1b.asp.

More detailed information may also be obtained by contacting the local offices of ETA (1-877-US-2JOBS) or the Wage and Hour Division of the Employment Standards Administration (1-866-4USWAGE). Information on how to submit a petition requesting an H-1B visa may be obtained from the INS (www.ins.gov).

Penalties/Sanctions

When violations are found, the Administrator of the Wage and Hour Division may assess civil money penalties with maximums ranging from \$1,000 to \$35,000 per violation, depending on the type and severity of the violation. The Administrator may also impose other remedies, including payment of back wages.

Within 15 days of the date of the determination, any interested party may request a hearing on the Wage and Hour Administrator's determination before an administrative law judge. Within 30 days of the decision by an administrative law judge, an interested party may request a review of the administrative law judge's decision by the Department's Administrative Review Board.

Employers found to have committed certain violations may also be precluded from future access to the H-1B program and other immigrant programs for a period of at least one year.

Relation to State, Local and Other Federal Laws

Various other laws, such as worker's compensation, tax (unemployment insurance, local, state, and federal), the Fair Labor Standards Act, and the Family and Medical Leave Act, may apply to the employment of these workers.

Permanent Employment of Workers Based on Immigration

(8 USC §1101 *et seq.*; 20 CFR 656)

Who is Covered

Section 212(a) of the Immigration and Nationality Act applies to employers seeking to hire foreign workers immigrating for the purpose of employment. Section 192(a) of IMMACT requires employers to provide notice of the filing of a permanent labor certification application.

Basic Provisions/Requirements

Before a foreign worker can be admitted to the U.S. for permanent employment, the prospective employer must obtain a labor certification from the Secretary of Labor. The Secretary must certify that there are not sufficient U.S. workers who are able, willing, qualified and available, and that the employment of an immigrant foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers.

The employer begins the labor certification process by filing Parts A and B of an Application for Alien Employment Certification, Form ETA 750 (www.workforcesecurity.doleta.gov/foreign/750inst.asp), with the State Workforce Agency (SWA) serving the geographic area where the alien will work. Employers are required to recruit U.S. workers at prevailing wages and working conditions through the SWA by placing a job order with the SWA and by placing an advertisement, depending upon the occupation, in a newspaper of general circulation or in a professional, trade or ethnic journal. The employer must also provide notice of the filing of the application for labor certification at the facility or location of the employment. Regional certifying officers have broad authority to require an employer to use other sources to recruit for U.S. workers that may be appropriate in a particular case.

In addition to recruiting through the SWA, employers may also recruit before filing their applications pursuant to the reduction in recruitment (RIR) provisions of the regulations at 20 CFR 656.21(i). The RIR provisions allow certifying officers to reduce, partially or completely, the employer's recruitment efforts through the SWAs (e.g., by partially or completely decreasing the number of days which the employer must run the job order and/or ad).

A decision to grant or deny an employer's application for a permanent alien employment certification is based on the results of the employer's recruitment efforts and compliance with the Department of Labor's regulations governing the permanent labor certification process. Those regulations are found at 20 CFR part 656.

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Employee Rights

All appropriate protections under U.S. labor laws apply to these workers.

Compliance Assistance Available

Employers may obtain information on how to apply for a permanent labor certification, including application forms and regulatory and procedural requirements, from the SWAs, the regional offices of the Employment and Training Administration, or from www.ows.doleta.gov. Form ETA 7500 may be downloaded from the Web site as well.

SWA staff members can help employers fill out application forms, place job orders, and draft advertisements that meet regulatory requirements. Copies of the regulations and applications forms are also available from www.workforcesecurity.doleta.gov/foreign.

Penalties/Sanctions

Not applicable.

Relation to State, Local and Other Federal Laws

Various other laws, such as workers' compensation, tax (unemployment insurance, local, state and federal), the Fair Labor Standards Act, and the Family Medical and Leave Act, may apply to the employment of these workers.

Nurses (H-1C Visas)

The Nursing Relief for Disadvantaged Areas Act of 1999 (NRDAA) Amending the Immigration and Nationality Act (8 USC §1101(a)(15)(h)(i); 20 CFR 655)

Who is Covered

The Nursing Relief for Disadvantaged Areas Act of 1999 (NRDAA) allows qualified hospitals to employ temporary foreign workers (nonimmigrants) as registered nurses (RNs) for up to three years under H-1C visas. Only 500 H-1C visas can be issued each year during the four-year period of the H-1C program. To qualify for this program, a hospital must:

- Be a “subpart d” hospital under the Social Security Act;
- Be located in an area with a shortage of health professionals;
- Have at least 190 acute care beds;
- Be reimbursed by Medicare for at least 35% of acute care inpatient days; and
- Be reimbursed by Medicaid for at least 28% of acute care inpatient days.

Basic Provisions/Requirements

A qualified hospital (“facility”) begins the process by filing an attestation with the Department of Labor that addresses eight elements. Among other things, these elements require the prospective employer of H-1C nurses to pay no less than the prevailing wage to all RNs (both U.S. and H-1C); notify all RNs at the facility of its intent to petition for H-1C nurses; take steps to recruit, train and retain U.S. RNs; and not lay off any U.S. RN while petitioning for H-1C nurses.

When the Department accepts the attestation for filing, the facility may file a petition with the Immigration and Naturalization Service (INS) for the admission of H-1C nurses. The facility must keep certain documents available for public inspection, including the Attestation, the facility pay schedule for nurses, evidence of its efforts to retain U.S. RNs, notices of any strikes or labor disputes involving RNs at the facility, and copies of notices of the facility’s intent to petition for H-1C nurses.

The Employment and Training Administration (ETA) administers the attestation process, while the Wage and Hour Division of the Employment Standards Administration determines whether a hospital has complied with the attestations.

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Employee Rights

All appropriate protections under U.S labor laws apply to these workers.

Compliance Assistance Available

More detailed information may be obtained by contacting the local Employment and Training Administration (1-877-US-2JOBS) and Wage and Hour Division offices (1-866-4USWAGE).

Penalties/Sanctions

When violations are found, the Administrator of the Wage and Hour Division may assess a civil money penalty not to exceed \$1,000 per RN per violation and impose other appropriate remedies, including payment of back wages and the performance of attested obligations. Within 10 days of the date of the determination, an employer may request a hearing on the determination of a violation before an administrative law judge. Within 30 days of the decision by an administrative law judge, an interested party may request a review of the administrative law judge's decision by the Department's Administrative Review Board. Employers found to have committed violations may also be precluded from access to the H-1C program for at least one year.

Relation to State, Local, and Other Federal Laws

Various other laws, such as workers' compensation, tax (unemployment insurance, local, state, and federal), the Fair Labor Standards Act, and the Family and Medical Leave Act, may apply to the employment of these workers.

Crewmembers (D-1 Visas)

The Immigration Act of 1990 (IMMACT), The Coast Guard Authorization Act of 1993, as amended, The Immigration and Nationality Act (INA) (8 USC §1101 *et seq.*; 20 CFR 655)

Who is Covered

These provisions apply to vessels/employers seeking to employ their nonimmigrant aliens as crewmembers to perform longshore work in U.S. ports under D-1 visas.

Basic Provisions/Requirements

The INA was amended to prohibit alien crewmembers (D-visa holders) from performing longshore work in U.S. ports unless one of the following provisions applies:

- A reciprocity agreement between the U.S. and the vessel/employer's country is in place;
- A port's collective bargaining agreement(s) allows the employment of D-visa workers to perform longshore work;
- The vessel/employer filed an attestation (Form ETA 9033) with the Department of Labor under the prevailing practice exception;
- The vessel/employer filed an attestation (Form ETA 9033-A) with the Department of Labor under the State of Alaska exception; or
- The longshore activity is performed with the use of an automated vessel.

The Employment and Training Administration administers the attestation process under the prevailing practice and State of Alaska exceptions. The Wage and Hour Division of the Employment Standards Administration investigates and resolves complaints that the employer failed to meet conditions to which it attested, misrepresented a material fact in an attestation, or failed to use the automated vessel exception properly.

Employee Rights

U.S. workers have the right not to have foreign crewmembers on D-visas perform longshore work during a strike or lockout in the course of a labor dispute. Also, the performance of the longshore work by foreign crewmembers must not be intended to influence an election of a bargaining representative for workers in the local port.

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The employer must provide notice of the filing of an attestation to longshore workers employed at the local port. Any aggrieved party or organization (including bargaining representatives in the local port) may file a complaint alleging a misrepresentation on an attestation or a failure to comply with the terms thereof.

Under the State of Alaska exception, an employer must make a bona fide request for and employ U.S. workers who are qualified and available in sufficient numbers to perform the longshore work. Only where sufficient U.S. longshore are unavailable may the employer use alien crewmembers to perform the work.

U.S. workers have a right to protection against discrimination. No employer may intimidate, threaten, blacklist, discharge, or in any other manner discriminate against any person for disclosing violations of the regulations or for cooperating in an official investigation of the employer's compliance.

Compliance Assistance Available

General information on the filing of attestations under the prevailing practice and State of Alaska exceptions may be accessed at www.ows.doleta.gov. More detailed information may be obtained by contacting the local offices of the Employment and Training Administration (1-877-US-2JOBS) and the Wage and Hour Division (1-866-4USWAGE).

Penalties/Sanctions

When violations are found, the Wage and Hour Division may assess a civil money penalty not to exceed \$5,000 per crewmember employed in violation and other appropriate remedies. Any interested party may request a hearing on the Wage and Hour Administrator's determination before an administrative law judge, and any interested party may petition the Secretary of Labor to review the administrative law judge's decision.

During an investigation, the Wage and Hour Division may enter a "cease and desist" order against the employer. When a "cease and desist" order has been entered, an employer may not use the services of D-visa crewmembers. Vessels owned by an employer found in violation of this program will not be allowed to enter U.S. ports and may be precluded from future access to the D-1 program for up to one year.

Relation to State, Local and Other Federal Laws

Various other laws, such as the Fair Labor Standards Act, may apply to these workers.

Wages in Supply and Equipment Contracts

Walsh–Healey Public Contracts Act (PCA) (41 USC §35 *et seq.*; 41 CFR 50-201, 202, and 206)

Who is Covered

The Walsh–Healey Public Contracts Act (PCA) applies to contractors with contracts in excess of \$10,000 for the manufacturing or furnishing of materials, supplies, articles, or equipment to the U.S. Government or the District of Columbia. The Act covers employees who produce, assemble, handle, or ship goods under these contracts.

The Act does not apply to executive, administrative, and professional employees, or to outside salespersons exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act. Nor does it apply to certain office and custodial workers.

Certain contracts are not covered by this Act. They include:

- Purchases of materials, supplies, articles, or equipment as may usually be bought in the “open market”;
- Purchases of perishables;
- Purchases of agricultural products from the original producers;
- Contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or products;
- Contracts for public utility services and certain transportation and communication services; and
- Supplies manufactured outside the U.S. (including Puerto Rico) or the Virgin Islands.

Basic Provisions/Requirements

Covered contractors must pay employees on the contracts the federal minimum wage of \$5.15 an hour. The employers may pay special lower rates to apprentices, students in vocational education programs, and disabled workers if they obtain special certificates from the Department of Labor. Employees must also be paid one and one-half times their regular rate of pay for all hours worked over 40 in a workweek.

The Act prohibits the employment of youths less than 16 years of age and convicts, except under certain conditions. Not included in convict labor are persons paroled,

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pardoned, or discharged from prison, or prisoners participating in a work-release program. It is also unlawful to carry out the contract work under working conditions that are unsanitary, hazardous, or dangerous to the health and safety of employees.

Employee Rights

The PCA provides employees on covered federal contracts the right to be paid at least the minimum wage for all hours worked and time and one half their regular rate of pay for overtime hours. The Wage and Hour Division accepts complaints of alleged PCA violations.

Compliance Assistance Available

The Wage and Hour Division of the Employment Standards Administration enforces the wage and hour requirements of the Act. Depending on the type of contract, the Occupational Safety and Health Administration and the Mine Safety and Health Administration enforce the safety and health requirements. Additional information is available from local Wage and Hour offices. Compliance assistance information may also be obtained on the Wage and Hour Division's Web site (www.wagehour.dol.gov).

Penalties/Sanctions

Contractors and subcontractors who violate the Act may be subject to a variety of penalties. The underpayment of wages and overtime pay may result in the withholding of contract payments in amounts sufficient to reimburse the underpayment. The penalty for employing underage minors or convicts is \$10 per day per person, for which contract payments may also be withheld. The Department may also bring legal action to collect wage underpayment and fines for illegally employing minors and convicts. Willful violations may subject the employer to cancellation of the current contract and debarment from future federal contracts for a three-year period.

After an investigator has served a formal complaint to the contractor, a hearing is held before an administrative law judge. If the respondent has violated the Act, he or she can appeal the decision by filing a petition for review with the Administrative Review Board. Final determinations on violations and debarment may be appealed to and are enforceable through the federal courts.

Relation to State, Local and Other Federal Laws

State and local laws regulating wages and hours of work may also apply to employment subject to this Act. When this happens, the employer must observe the law setting the stricter standard. Compliance with the regulation's safety and health standards will not relieve anyone of any obligation to comply with stricter standards from another source. The Walsh–Healey Public Contracts Act and the Fair Labor Standards Act may apply simultaneously to the same employer.

Prevailing Wages in Service Contracts

McNamara–O’Hara Service Contract Act (SCA) (41 USC §351 *et seq.*; 29 CFR 4, 6, and 8)

Who is Covered

The McNamara–O’Hara Service Contract Act (SCA) covers contracts entered into by federal and District of Columbia agencies where the principal purpose of the contract is to furnish services in the U.S. through the use of “service employees.” The definition of “service employee” includes any employee engaged in performing services on a covered contract other than a bona fide executive, administrative, or professional employee who meets the exemption criteria set forth in 29 CFR Part 541.

The Act does not apply to certain types of contractual services. These statutory exemptions include:

- Contracts for construction, alteration, and/or repair of public buildings or public works, including painting and decorating (those covered by the Davis–Bacon Act);
- Work required in accordance with the provisions of the Walsh–Healey Public Contracts Act;
- Contracts for transporting freight or personnel where published tariff rates are in effect;
- Contracts for furnishing services by radio, telephone, telegraph, or cable companies subject to the Communications Act of 1934;
- Contracts for public utility services;
- Employment contracts providing for direct services to a federal agency by an individual or individuals;
- Contracts for operating postal contract stations for the U.S. Postal Service;
- Services performed outside the U.S. (except in territories administered by the U.S., as defined in the Act); and
- Contracts administratively exempted by the Secretary of Labor in special circumstances because of the public interest or to avoid impairment of government business.

Basic Provisions/Requirements

The Act requires contractors and subcontractors performing services on prime contracts in excess of \$2,500 to pay service employees in various classes no less than the wage rates and fringe benefits found prevailing in the locality, or the rates (including prospective increases) contained in a predecessor contractor’s collective

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bargaining agreement. The Department of Labor issues wage determinations on a contract-by-contract basis in response to specific requests from contracting agencies. These determinations are incorporated into the contract.

For contracts equal to or less than \$2,500, contractors are required to pay the federal minimum wage of \$5.15 an hour (as of September 1, 1997) as provided in Section 6(a)(1) of the Fair Labor Standards Act. Contractors must also, under the provisions of the Contract Work Hours and Safety Standards Act and the Fair Labor Standards Act, pay employees at least one and one-half times their regular rate of pay for all hours worked over 40 in a workweek.

In addition, no part of the contract work may be performed in buildings, surroundings, or under working conditions that are unsanitary, hazardous, or dangerous to the safety and health of employees. Finally, employers must notify employees working in connection with the contract of the compensation due them under the wage and fringe benefits provisions of the contract.

Employee Rights

The SCA provides covered service workers on federal service contracts the right to receive at least the locally prevailing wage rate and fringe benefits, as determined by the Department of Labor, for the type of work performed. The Wage and Hour Division of the Employment Standards Administration accepts complaints of alleged SCA wage violations.

Compliance Assistance Available

The Wage and Hour Division enforces the wage and hour requirements of the Act, while the Occupational Safety and Health Administration (OSHA) enforces its safety and health requirements. More detailed information, including copies of explanatory brochures and regulatory and interpretative materials, may be obtained from the local offices of the Wage and Hour Division or from www.dol.gov/esa/whd. More detailed information about safety and health requirements may be obtained from OSHA (1-800-321-OSHA).

Penalties/Sanctions

Violations of the SCA may result in contract terminations and liability for any resulting costs to the government, withholding of contract payments in sufficient amounts to cover wage and fringe benefit underpayments, legal action to recover the underpayments, and debarment from future contracts for up to three years.

Contractors and subcontractors may challenge determinations of violations and debarment before an administrative law judge. Contractors and subcontractors may appeal decisions of administrative law judges to the Administrative Review Board. Final Board determinations on violations and debarment may be appealed to and are enforceable through the federal courts.

Relation to State, Local and Other Federal Laws

This Act applies only to contracts awarded by the federal or District of Columbia governments. As noted above, contractors are required to compensate employees working in connection with covered contracts for overtime work in accordance with the overtime pay standards of the Fair Labor Standards Act and the Contract Work Hours and Safety Standards Act.

Prevailing Wages in Construction Contracts

Davis–Bacon Act and Related Acts (40 USC §276a; 29 CFR 1, 3, 5, 6 and 7)

Who is Covered

The Davis–Bacon and Related Acts apply to contractors and subcontractors performing on federally funded or assisted contracts in excess of \$2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works.

Basic Provisions/Requirements

The Act requires that all contractors and subcontractors performing on federal contracts (and contractors or subcontractors performing on federally assisted contracts under the related Acts) in excess of \$2,000 pay their laborers and mechanics not less than the prevailing wage rates and fringe benefits (as determined by the Secretary of Labor) for corresponding classes of laborers and mechanics employed on similar projects in the area.

Apprentices and trainees may be employed at less than predetermined rates. Apprentices must be employed pursuant to an apprenticeship program registered with the Department of Labor or with a state apprenticeship agency recognized by the Department. Trainees must be employed pursuant to a training program certified by the Department.

Contractors and subcontractors on prime contracts in excess of \$100,000 are also required, pursuant to the Contract Work Hours and Safety Standards Act, to pay employees one and one-half times their basic rates of pay for all hours over 40 worked on covered contract work in a workweek.

Covered contractors and subcontractors are also required to pay employees weekly and to submit weekly certified payroll records to the contracting agency.

Employee Rights

The Davis–Bacon and Related Acts provide laborers and mechanics on covered federally financed or assisted construction contracts the right to receive at least the locally prevailing wage rate and fringe benefits, as determined by the Department of Labor, for the type of work performed. The Wage and Hour Division and respective federal contracting agencies accept complaints of alleged Davis–Bacon violations.

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Compliance Assistance Available

The Wage and Hour Division of the Employment Standards Administration administers and enforces the Davis–Bacon Act. More detailed information, including copies of explanatory brochures and regulatory and interpretative materials, may be obtained by contacting the Wage and Hour Division’s local offices (1–866–4USWAGE). Compliance assistance information may also be obtained on the Wage and Hour Division’s Web site (www.wagehour.dol.gov).

Penalties/Sanctions

Contractors or subcontractors found to have disregarded their obligations to employees, or to have committed aggravated or willful violations while performing work on Davis–Bacon covered projects, may be subject to contract termination and debarment from future contracts for up to three years. In addition, contract payments may be withheld in sufficient amounts to satisfy liabilities for unpaid wages and liquidated damages that result from overtime violations of the Contract Work Hours and Safety Standards Act.

Contractors and subcontractors may challenge determinations of violations and debarment before an administrative law judge. Contractors and subcontractors may appeal decisions by administrative law judges with the Department’s Administrative Review Board. Final Board determinations on violations may be appealed to and are enforceable through the federal courts.

Falsification of certified payroll records or the required kickback of wages may subject a contractor or subcontractor to civil or criminal prosecution, the penalty for which may be fines and/or imprisonment.

Relation to State, Local and Other Federal Laws

Since 1931, Congress has extended the Davis–Bacon prevailing wage requirements to some 60 related Acts which provide federal assistance for construction through loans, grants, loan guarantees and insurance. These Acts include by reference the requirements for payment of the prevailing wages in accordance with the Davis–Bacon Act. Examples of the related Acts are the Federal-Aid Highway Acts, the Housing and Community Development Act of 1974, and the Federal Water Pollution Control Act.

Hours and Safety Standards In Construction Contracts

Contract Work Hours and Safety Standards Act (CWHSSA) (40 USC §327 *et seq.*; 29 CFR 5)

Who is Covered

The Contract Work Hours and Safety Standards Act (CWHSSA) applies to contractors and subcontractors with federal service contracts and federally funded and assisted construction contracts over \$100,000. Covered contracts include those entered into by the U.S., any agency or instrumentality of the U.S., any territory of the U.S., or the District of Columbia.

The Act also extends to federally assisted construction contracts subject to Davis–Bacon related Act wage standards where the Federal Government is not a direct party, except those contracts where the federal assistance takes the form only of a loan guarantee or insurance.

Certain contracts are exempt from this Act. These include contracts for the following:

- Transportation by land, air, or water;
- Transmission of intelligence;
- Purchase of supplies, materials, or articles ordinarily available in the “open market”; and
- Work required to be done according to provisions of the Walsh–Healey Public Contracts Act.

Basic Provisions/Requirements

The Act requires contractors and subcontractors with covered contracts to pay laborers and mechanics employed in the performance of the contracts one and one-half times their basic rate of pay for all hours worked over 40 in a workweek. This Act also prohibits unsanitary, hazardous, or dangerous working conditions in the construction industry on federal and federally financed and assisted projects.

Employee Rights

The CWHSSA provides most workers on federal contracts the right to receive time and one-half for overtime hours worked on such contracts. The Wage and Hour Division accepts complaints of alleged CWHSSA wage violations.

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Compliance Assistance Available

The Wage and Hour Division of the Employment Standards Administration enforces the compensation requirements of this Act, while the Occupational Safety and Health Administration enforces the safety and health requirements. More detailed information, including copies of explanatory brochures and regulatory and interpretative materials, may be obtained by contacting the Wage and Hour Division's local offices (1-866-4USWAGE). Compliance assistance information may also be obtained on the Wage and Hour Division's Web site (www.wagehour.dol.gov).

Penalties/Sanctions

Contractors or subcontractors who violate this Act may be subject to fines, imprisonment, or both. Intentional violations of this Act are misdemeanors and may be punished by a fine not to exceed \$1,000 or by imprisonment for not more than six months, or both. Overtime wage violations may result in the assessment of liquidated damages in the sum of \$10 for each calendar day an employee is allowed to work in excess of a 40-hour workweek without payment of the required overtime compensation.

Accrued contract amounts may also be withheld in sums necessary to satisfy the liability for unpaid wages and liquidated damages. Employees have rights of action and/or of intervention against the contractor and its sureties if the amounts withheld are insufficient to reimburse the unpaid wages. Under such an action, it is no defense that employees accepted less than the required rate of wages or voluntarily made refunds.

Contractors or subcontractors found to have committed willful or aggravated violations of the overtime requirements may have their contracts terminated and may be declared ineligible to receive future contracts for a period not to exceed three years.

Contractors or subcontractors may challenge determinations of violations before an administrative law judge. Contractors or subcontractors may appeal decisions and orders of administrative law judges that result in payment of wages or debarment to the Administrative Review Board. Final determinations on violations and debarment may be appealed to and are enforceable through the federal courts.

Any contractor or subcontractor aggrieved by withholdings for liquidated damages may appeal to the head of the contracting agency. The agency head shall review the administrative determination and issue a final order. If the damages sum is determined to be incorrect, or the contractor or subcontractor inadvertently violated the provisions of the Act while exercising due care, the agency head may recommend appropriate adjustments in the liquidated damages to the Secretary of Labor. The contractor or subcontractor may file a claim in the U.S. Claims Court for all final orders mandating a liability for withholding of liquidated damages.

Relation to State, Local and Other Federal Laws

The provisions of this Act also apply to Davis-Bacon and Related Acts contracts where the contract is financed in whole or in part by grants or loans from the U.S. Government, or loans insured or guaranteed by the U.S. Government, except where the federal assistance is only in the nature of a loan guarantee or insurance.

“Kickbacks” in Federally Funded Construction

Copeland Act (18 USC §874 and 40 USC §276c; 29 CFR 3)

Who is Covered

The “Anti-Kickback” section of the Copeland Act applies to all contractors and subcontractors performing on any federally funded or assisted contract for the construction, prosecution, completion or repair of any public building or public work, except contracts for which the only federal assistance is a loan guarantee. This provision applies even where no labor standards statute covers the contract.

The regulations pertaining to Copeland Act payroll deductions and submittal of the weekly statement of compliance apply only to contractors and subcontractors performing on federally funded contracts in excess of \$2,000 and federally-assisted contracts in excess of \$2,000 that are subject to federal wage standards.

Basic Provisions/Requirements

The “Anti-Kickback” section of the Act precludes a contractor or subcontractor from in any way inducing an employee to give up any part of the compensation to which he or she is entitled under his or her contract of employment. The Act and implementing regulations require a contractor and subcontractor to submit a weekly statement of the wages paid to each employee performing on covered work during the preceding payroll period. The regulations also list payroll deductions that are permissible without the approval of the Secretary of Labor and those deductions that require consent of the Secretary of Labor.

Employee Rights

The “Anti-Kickback” provisions of the Copeland Act give covered workers on subject federal contracts the right to receive the full pay to which they are entitled for the work they perform. The Act also gives such workers the right to receive pay on a weekly basis. The Wage and Hour Division of the Employment Standards Administration accepts complaints of alleged Copeland Act wage violations.

Compliance Assistance Available

The Wage and Hour Division enforces the provisions of the Act and implementing regulations. More detailed information, including copies of the regulatory materials, may be obtained by contacting the local Wage and Hour offices (1-866-4USWAGE).

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Compliance assistance information may also be obtained on the Wage and Hour Division's Web site (www.wagehour.dol.gov).

Penalties/Sanctions

Any contractor or subcontractor who induces an employee working on a covered contract to give up any part of the compensation to which he or she is entitled is subject to a \$5,000 fine, or imprisonment for up to five years, or both. Willful falsification of the statement of compliance may subject the employer to civil or criminal prosecution and may be cause for contract termination or debarment. Contractors may challenge determinations on debarment before an administrative law judge. Decisions of administrative law judges may be appealed to the Administrative Review Board. Final determinations on debarment may be appealed to and are enforceable through the federal courts. Civil and criminal sanctions are pursued through the federal courts.

Relation to State, Local and Other Federal Laws

The "Anti-Kickback" provisions apply to any contract assisted in whole or in part by loans or grants from the federal government, except those contracts where the only federal assistance is a loan guarantee. The provisions of the Act and the regulation pertaining to the weekly statement of wages and payroll deductions apply to federally assisted contracts that are subject to federal wage standards.

Employment Discrimination and Equal Opportunity in Supply and Service Contracts

Executive Order 11246, as amended (Parts II, III, and IV) (41 CFR Chapter 60, Parts 60-1, 60-2, 60-3, 60-20, and 60-50)

Who is Covered

Executive Order 11246 and its implementing regulations cover employers with federal contracts or subcontracts that exceed \$10,000 or that will (or can reasonably be expected to) accumulate to more than \$10,000 in any 12-month period.

Contracts covered by the Executive Order and regulations may be for the purchase, sale or use of personal property, nonpersonal services, or both. In this context, the term “personal property” includes supplies and contracts for the use of real property, such as lease arrangements, unless the contract for the use of real property is *itself* considered real property (such as with easements). The term “nonpersonal services” includes services such as utilities, construction, transportation, research, insurance, and fund depository. Agreements in which the parties stand in the relationship of employer and employee are not covered.

The following types of contracts and subcontracts are *exempt* from the Executive Order:

- Those not exceeding \$10,000;
- Those for indefinite quantities, unless the purchaser has reason to believe that the cost in any one year will be over \$10,000; and
- Those for work that is performed outside the U.S. by employees who were not recruited in the U.S.

Specific exemptions may apply to the following:

- Contracts and subcontracts with certain religiously-oriented educational institutions;
- Contracts and subcontracts for work on or near Indian reservations;
- Contracts and subcontracts involving national security, if the head of the contracting agency determines both that (1) the contract is essential to national security, and (2) noncompliance with a particular requirement of the Executive Order or the regulations with respect to the process of awarding the contract is essential to national security;

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- Specific contracts or subcontracts, if the Deputy Assistant Secretary decides that special circumstances in the national interest require such an exemption;
- Contractor facilities not related to contract performance, as determined by the Office of Federal Contract Compliance Programs (OFCCP); and
- Contracts and subcontracts with state or local governments, except for the specific government entity that participates in work on or under the contract.

Moreover, contractors or subcontractors that are religious entities may grant employment preferences to individuals of a particular religion to perform work connected with carrying out the activities of the religious entity.

Basic Provisions/Requirements

The Executive Order requires covered contractors and subcontractors to refrain from discrimination and to engage in affirmative steps to ensure that applicants and employees receive equal employment opportunity regardless of race, color, religion, sex, and/or national origin. Sexual harassment is a violation of the Executive Order.

The Order requires all covered contractors and subcontractors to include a specific equal opportunity clause in each of their nonexempt contracts and subcontracts. The Order and the regulations provide the required language (www.dol.gov/esa/regs/statutes/ofccp/eo11246.htm) for this clause.

The Department of Labor's regulations prohibit discrimination in such employment practices as recruitment, rates of pay, upgrading, layoff, promotion, and selection for training. Employers may not make distinctions based on race, color, religion, sex or national origin in recruitment or advertising efforts, employment opportunities, wages, hours, job classifications, seniority, retirement ages, or job fringe benefits such as employer contributions to company pension or insurance plans. The regulations include other requirements, such as those summarized below.

Nonconstruction (supply and service) contractors and subcontractors that employ 50 or more persons and that also satisfy at least one of four additional criteria (e.g., having a federal contract of \$50,000 or more) must develop written affirmative action programs (AAPs). Usually an AAP must cover each of the contractor's establishments.

If a contractor wishes to establish an AAP other than by establishment, the contractor may reach agreement with OFCCP on the development and use of functional AAPs, which are organized along functional or business lines. The AAP is a management tool designed to encourage equal employment opportunity.

In general, the AAP will describe the policies, practices and procedures that the contractor or subcontractor uses to ensure that all qualified applicants and employees receive equal opportunities for employment and advancement. If the contractor or subcontractor is not employing women or minorities at a rate to be expected given their availability in the relevant labor pool, the AAP will include specific practical steps to address the issue. Contractors with AAPs must implement them, keep them on file, and update them annually. Additional information on AAPs may be found at www.dol.gov/esa/regs/fedreg/final/2000028693.htm.

Covered contractors and subcontractors, regardless of company size, may not use exclusionary policies that treat men and women differently. For example, a contractor or subcontractor that hires or promotes a man who has young children cannot deny a job or a promotion to a woman because she has young children.

Covered contractors and subcontractors also may not depend on state “protective” laws to deny employment to qualified female applicants. Such “protective” laws include those prohibiting women from performing certain types of occupations, from working more than a certain number of hours, or from lifting more than a certain amount of weight.

Covered contractors and subcontractors that qualify as “employers” under Title VII of the Civil Rights Act of 1964 are required to comply with the Pregnancy Discrimination Act of 1978. Additional information on this law may be found at www.eeoc.gov/facts/fs-preg.html. All covered contractors and subcontractors must also provide equal fringe benefits, and make equal contributions for such benefits for men and women.

Moreover, employers are required to take all necessary actions to ensure that no one attempts to intimidate or discriminate against an individual for filing a complaint or participating in a proceeding under the Executive Order.

Employee Rights

Anyone has the right to file a complaint with OFCCP if he or she believes that a federal contractor or subcontractor has discriminated on the basis of race, color, religion, sex or national origin. In most cases, complaints must be filed within 180 days of the discriminatory action. Anyone may call OFCCP with a question about interpreting the regulations, filing a complaint, or any other related matter. The main telephone numbers for OFCCP’s national offices are 202–693–0101 and 202–693–1308 (TTY).

Compliance Assistance Available

More detailed information, including copies of explanatory brochures and regulatory and interpretative materials, may be obtained from the OFCCP Web site (www.dol.gov/esa/ofccp) or by contacting OFCCP’s local offices (www.dol.gov/esa/contacts/ofccp/ofcpkeyp.htm).

Penalties/Sanctions

OFCCP investigates for violations of the Executive Order through compliance evaluations or in response to complaints. If a violation is found, OFCCP may ask the federal contractor or subcontractor to enter into conciliation negotiations. If conciliation efforts fail, OFCCP may, through its attorneys, (1) initiate an administrative enforcement proceeding by filing an administrative complaint against the contractor, or (2) refer the matter to the Department of Justice for action by the Attorney General.

If OFCCP files an administrative complaint, the contractor or subcontractor has 20 days to request a review by an administrative law judge (ALJ), who hears the case and recommends a decision. If the contractor or subcontractor is dissatisfied with the ALJ’s decision, it may appeal the decision to the Department of Labor’s Administrative Review Board. The Board issues the final decision, whether or not there is an appeal.

If the Board finds that the contractor or subcontractor has violated the Executive Order, it may order the contractor or subcontractor to provide appropriate relief, which may include restoration of back pay and employment status and benefits for the victim(s) of discrimination. Depending on the circumstances, violations also may result in cancellation, suspension, or termination of contracts, withholding of progress payments, debarment, and/or other sanctions.

If the contractor or subcontractor is dissatisfied with the Board's decision, it may appeal that decision to the federal courts.

Relation to State, Local and Other Federal Laws

OFCCP generally refers individual complaints alleging discrimination based on race, color, religion, sex, or national origin to the Equal Employment Opportunity Commission (www.eeoc.gov) for investigation and resolution.

The Executive Order and its implementing regulations apply only to the specific state or local government entities that participate in work on or under a federal contract or subcontract. This coverage is narrower than that which applies to private sector employers.

Employment Discrimination in Construction Contracts

Executive Order 11246, as amended (Parts II, III, and IV) (41 CFR Chapter 60, Parts 60-1, 60-3, 60-4, 60-20 and 60-50)

Who is Covered

Executive Order 11246 and its implementing regulations cover employers with federal contracts or subcontracts that exceed \$10,000, or that will (or can reasonably be expected to) accumulate to more than \$10,000 in any 12-month period.

Covered contracts may be for the purchase, sale or use of personal property, nonpersonal services, or both. In this context, the term “nonpersonal services” includes services such as construction. Agreements where the parties stand in the relationship of employer and employee are not covered.

In addition, the Executive Order and the regulations cover contractors and subcontractors who hold any federally assisted construction contract in excess of \$10,000. Under Section III of the Executive Order, in all contracts for construction to be financed wholly or partially by federal financial assistance, all applicants for federal financial assistance must include a specific clause notifying the construction contractor that it is covered by the Executive Order. All applicants must also agree to cooperate with the Secretary of Labor in enforcing the Order.

The following types of contracts and subcontracts are *exempt* from the Executive Order:

- Those not exceeding \$10,000;
- Those for indefinite quantities, unless the purchaser has reason to believe that the cost in any one year will be over \$10,000; and
- Those for work that is performed outside the U.S. by employees who were not recruited in the U.S.

Specific exemptions may apply to the following:

- Contracts and subcontracts with certain religiously-oriented educational institutions;
- Contracts and subcontracts for work on or near Indian reservations;
- Contracts and subcontracts involving national security, if the head of the contracting agency determines both that (1) the contract is essential to national security, and (2) noncompliance with a particular requirement of the Executive Order or the regulations with respect to the process of awarding the contract is essential to national security;

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- Specific contracts or subcontracts, if the Deputy Assistant Secretary decides that special circumstances in the national interest require such an exemption;
- Contractor facilities not related to contract performance, as determined by the Office of Federal Contract Compliance Programs (OFCCP); and
- Contracts or subcontracts with state or local governments, except for the specific government entity that participates in work on or under the contract.

Moreover, contractors or subcontractors that are religious entities may grant employment preferences to individuals of a particular religion to perform work connected with carrying out the activities of the religious entity.

Basic Provisions/Requirements

The Executive Order and the regulations require covered contractors and subcontractors to refrain from discrimination and take affirmative steps to ensure that applicants and employees receive equal employment opportunity regardless of race, color, religion, sex, and/or national origin.

Covered contractors and subcontractors must make good faith efforts to achieve goals set by OFCCP for the employment of women and minorities in all crafts and trades in their area. These contractors and subcontractors must pursue such goals on all their construction work, whether or not federal or federally assisted. They must also include a specific equal opportunity clause in each of their nonexempt contracts and subcontracts. The Order and the regulations provide the required language (www.dol.gov/esa/regs/statutes/ofccp/eo11246.htm) for this clause.

Although they are not required to create written affirmative action programs (AAPs), construction contractors and subcontractors must follow the regulations that require federal and federally assisted construction contractors and subcontractors to take specific affirmative steps to ensure equal employment opportunity. Contractors and subcontractors must also fully document their affirmative action efforts.

All construction contractors and subcontractors, whether or not federally assisted, are prohibited from discrimination based on race, color, religion, sex, and national origin in such employment practices as recruitment, rates of pay, hours, upgrading, layoff, promotion, selection for training, advertising efforts, job classifications, seniority, retirement ages, or job fringe benefits such as employer contributions to company pension or insurance plans. Sexual harassment is also a violation of the nondiscrimination provisions of the Executive Order.

The regulations also include other specific requirements, such as those summarized below.

- Covered contractors and subcontractors, regardless of company size, are barred from using exclusionary policies that treat men and women differently. For example, a contractor or subcontractor that hires or promotes a man who has young children cannot deny a job or a promotion to a woman because she has young children.
- Covered contractors and subcontractors also may not depend on state “protective” laws to deny employment to qualified female applicants. Such “protective” laws include those prohibiting women from performing certain types of occupations, from working more than a certain number of hours, or from lifting more than a certain amount of weight.

- Covered contractors and subcontractors that qualify as “employers” under Title VII of the Civil Rights Act of 1964 are required to comply with the Pregnancy Discrimination Act of 1978. Additional information on this law may be found at www.eeoc.gov/facts/fs-preg.html. Such employers must also provide equal fringe benefits, and make equal contributions for such benefits, for men and women.
- Covered contractors and subcontractors are required to take all necessary actions to ensure that no one attempts to intimidate or discriminate against an individual for filing a complaint or participating in a proceeding under the Executive Order.

Employee Rights

Anyone has the right to file a complaint with OFCCP if he or she believes that a federal contractor or subcontractor has discriminated on the basis of race, color, religion, sex, or national origin. In most cases, complaints must be filed within 180 days of the discriminatory action. Anyone may call OFCCP with a question about interpreting the regulations, filing a complaint, or any other related matter. The main telephone numbers for OFCCP’s national offices are 202–693–0101 and 202–693–1308 (TTY).

Compliance Assistance Available

More detailed information, including copies of explanatory brochures and regulatory and interpretative materials, may be obtained from the OFCCP Web site (www.dol.gov/esa/ofccp) or by contacting OFCCP’s local offices (www.dol.gov/esa/contacts/ofccp/ofcpkeyp.htm).

Penalties/Sanctions

OFCCP investigates for violations of the Executive Order either through compliance evaluations or in response to complaints. If a violation is found, OFCCP may ask the contractor or subcontractor to enter into conciliation negotiations. If conciliation efforts fail, OFCCP may (1) initiate an administrative enforcement proceeding by filing an administrative complaint against the contractor, or (2) refer the matter to the Department of Justice for action by the Attorney General.

If OFCCP files an administrative complaint, the contractor or subcontractor has 20 days to request a review by an administrative law judge (ALJ), who hears the case and recommends a decision. If the contractor or subcontractor is dissatisfied with the ALJ’s decision, it may appeal the decision to the Department of Labor’s Administrative Review Board. The Board issues the final decision, whether or not there is an appeal.

If the Board finds that the contractor or subcontractor has violated the Executive Order, it may order the contractor or subcontractor to provide appropriate relief, which may include restoration of back pay and employment status and benefits for the victim(s) of discrimination. Depending on the circumstances, violations also may result in cancellation, suspension, or termination of contracts, withholding of progress payments, and debarment.

If the contractor or subcontractor is dissatisfied with the Board’s decision, it may appeal that decision to the federal courts.

Relation to State, Local and Other Federal Laws

OFCCP generally refers individual complaints alleging discrimination based on race, color, religion, sex or national origin to the Equal Employment Opportunity Commission (www.eeoc.gov) for investigation and resolution.

The Executive Order and its implementing regulations apply only to the specific state or local government entities that participate in work on or under a federal contract or subcontract. This coverage is narrower than that which applies to employers in the private sector.

Equal Opportunity for Individuals with Disabilities

Rehabilitation Act of 1973, as amended (29 USC §793; P.L. 93-112, Section 503; 41 CFR Chapter 60, Part 741 and 742)

Who is Covered

Section 503 of the Rehabilitation Act of 1973, as amended, requires employers with federal contracts or subcontracts that exceed \$10,000, and contracts or subcontracts for indefinite quantities (unless the purchaser has reason to believe that the cost in any one year will not exceed \$10,000), to take affirmative steps to hire, retain, and promote qualified individuals with disabilities. The regulations implementing Section 503 make clear that this obligation to take affirmative steps includes the duty to refrain from discrimination in employment against qualified individuals with disabilities.

The following types of contracts and subcontracts are *exempt* from Section 503:

- Those not exceeding \$10,000;
- Those for work that is performed outside the U.S.; and
- Those with state or local governments, except for the specific government entity that participates in work on or under the contract.

The Deputy Assistant Secretary may grant a waiver from the requirements of Section 503 in the following circumstances:

- For specific contracts, subcontracts or purchase orders, if special circumstances in the national interest require such an exemption;
- For facilities not connected to performance of the federal contract, upon the written request of the contractor, if certain conditions listed in the regulations are met. This type of waiver will terminate, at the very latest, two years after the date on which the waiver is granted, and earlier under certain specific circumstances; and
- Contracts and subcontracts involving national security, if the head of the contracting agency determines both that (1) the contract is essential to national security, and (2) noncompliance with a particular requirement of the Executive Order or the regulations with respect to the process of awarding the contract is essential to national security.

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Under Section 503 and its implementing regulations, an “individual with a disability” means a person who (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment.

A “qualified individual with a disability” means a person with a disability who satisfies the job-related requirements of the employment position he or she holds or is applying for, and who, with or without reasonable accommodation, can perform the essential job functions of that position.

Additional information on the definitions of “individual with a disability” and “qualified individual with a disability” can be found in several of the Enforcement Guidances published by the Equal Employment Opportunity Commission (EEOC). These Guidances may be found at www.eeoc.gov/policy/guidance.html.

Basic Provisions/Requirements

Under Section 503 and its implementing regulations, covered employers with federal contracts or subcontracts must take affirmative steps to employ qualified individuals with disabilities. This obligation covers the full range of employment and personnel practices, such as recruitment, hiring, rates of pay, upgrading, and selection for training. All covered contractors and subcontractors must also include a specific equal opportunity clause in each of their nonexempt contracts and subcontracts. The regulations provide the required language for this clause.

In addition, Section 503 and its regulations require covered federal contractors and subcontractors to make reasonable accommodations for the known physical or mental limitations of qualified individuals with disabilities, unless providing an accommodation would create an undue hardship. Furthermore, covered contractors and subcontractors are required to take all necessary actions to ensure that no one attempts to intimidate or discriminate against any individual for filing a complaint or participating in a proceeding under Section 503.

Under Section 503, each employer that has both (1) a federal contract or subcontract of \$50,000 or more, and (2) 50 or more employees, must prepare, implement, and maintain a written affirmative action program covering each of its establishments. The employer must review and update the program annually and must make it available for inspection by any employee or applicant for employment, as well as by the Office of Federal Contract Compliance Programs (OFCCP). The program may be integrated with, or kept separate from, any other affirmative action program the employer is required to prepare.

Employee Rights

Employees of and applicants for employment with a covered contractor or subcontractor have the right to file a complaint with OFCCP if they believe that a federal contractor or subcontractor has discriminated against them on the basis of a disability. Anyone may call OFCCP with a question about interpreting the regulations, filing a complaint, or any other related matter. The main telephone numbers for OFCCP’s national offices are 202–693–0101 and 202–693–1308 (TTY).

Compliance Assistance Available

More detailed information, including copies of explanatory brochures and regulatory and interpretative materials, may be obtained from the OFCCP Web site (www.dol.gov/esa/ofccp) or by contacting OFCCP's local offices (www.dol.gov/esa/contacts/ofccp/ofcpkeyp.htm).

Penalties/Sanctions

OFCCP investigates for violations of Section 503 either through compliance evaluations or in response to complaints. If a violation is found, OFCCP may ask the federal contractor or subcontractor to enter into conciliation negotiations. If conciliation efforts fail, OFCCP may initiate an administrative enforcement proceeding by issuing an administrative complaint against the contractor or subcontractor.

If OFCCP files an administrative complaint, the contractor or subcontractor has 20 days to request a review by an administrative law judge (ALJ), who hears the case and recommends a decision. If the contractor or subcontractor is dissatisfied with the ALJ's decision, it may appeal the decision to the Department of Labor's Administrative Review Board. The Board issues the final decision, whether or not there is an appeal.

If the Board finds that a violation of Section 503 has occurred, it may order the contractor or subcontractor to provide appropriate relief, which may include back pay and benefits, and restoration of employment status, for the victim(s) of discrimination. Depending on the circumstances, violations also may result in cancellation, suspension, or termination of contracts, withholding of progress payments, and debarment.

If the contractor or subcontractor is dissatisfied with the Board's decision, it may appeal that decision to the federal courts.

Relation to State, Local and Other Federal Laws

Section 503 and its implementing regulations apply only to the specific state or local government entities that participate in work on or under a federal contract or subcontract. This coverage is narrower than that which applies to employers in the private sector.

Section 107(b) of the Americans With Disabilities Act of 1990 (ADA) required agencies with enforcement responsibilities under the Rehabilitation Act of 1973 (e.g., OFCCP) and under Title I of the ADA (i.e., the Equal Employment Opportunity Commission) to develop procedural regulations to ensure that complaints filed under these laws are addressed in a manner that avoids duplication of effort and prevents application of inconsistent or conflicting standards for the same requirements under the two laws. These regulations are found at 41 CFR Part 60-742.

Employment Discrimination and Equal Opportunity for Certain Veterans Who Served on Active Duty and Special Disabled Veterans

Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), as amended; Veterans Employment Opportunities Act of 1998 (VEOA); and Veterans Benefits and Health Care Improvement Act of 2000 (38 USC §4212, as amended; 41 CFR Chapter 60, Part 60-250)

Who is Covered

Title 38 of the U.S. Code, Section 4212, covers employers with federal contracts or subcontracts for \$25,000 or more. Contracts covered by Section 4212 and its regulations may be for the purchase, sale or use of personal property, nonpersonal services, or both. In this context, the term "nonpersonal services" includes services such as construction. Agreements in which the parties stand in the relationship of employer and employee are not covered.

The following types of contracts and subcontracts are *exempt* from Section 4212:

- Those for less than \$25,000;
- Those for indefinite quantities, unless the purchaser has reason to believe that the cost in any one year will be \$25,000 or more;
- Those for work that is performed outside the U.S.; and
- Those with state or local governments, except for the specific government entity that participates in work on or under the contract.

The Deputy Assistant Secretary may grant a waiver from the requirements of Section 4212 in the following circumstances:

- For specific contracts, subcontracts or purchase orders, if special circumstances in the national interest require such an exemption;
- For facilities not related to performance of the contract, as determined by the Office of Federal Contract Compliance Programs (OFCCP) upon written request by the contractor; and

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- Contracts and subcontracts involving national security, if the head of the contracting agency determines both that (1) the contract is essential to national security, and (2) noncompliance with a particular requirement of Section 4212 or the regulations with respect to the process of awarding the contract is essential to national security.

Until Congress passed the Veterans Employment Opportunities Act of 1998 (VEOA), Section 4212 applied to contractors and subcontractors with contracts of more than \$10,000. In addition, only “special disabled veterans” and “veterans of the Vietnam era” were protected under the section.

In VEOA and later amendments, Congress raised the minimum contract amount to \$25,000 and expanded the application of Section 4212 to include recently separated veterans and other protected veterans. The regulations implementing Section 4212, found at 41 CFR part 60-250, will be updated to reflect these changes. Because the changes are included in Congressional statutes, however, they apply even though the regulations have not yet been amended.

Definitions

Under Section 4212, a “veteran of the Vietnam era” means a veteran of the U.S. military, ground, naval, or air service, any part of whose service was during the period August 5, 1964 through May 7, 1975, who (1) served on active duty for a period of more than 180 days and was discharged or released with other than a dishonorable discharge, or (2) was discharged or released from active duty because of a service-connected disability. “Vietnam era veteran” also includes any veteran of the U.S. military, ground, naval, or air service who served in the Republic of Vietnam between February 28, 1961 and May 7, 1975.

A “special disabled veteran” means a veteran who served on active duty in the U.S. military, ground, naval, or air service and (1) who was discharged or released from active duty because of a service-connected disability, or (2) who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) for certain disabilities under laws administered by the Department of Veterans Affairs (i.e., disabilities rated at 30 percent or more, or at 10 or 20 percent if the veteran has been determined to have a serious employment handicap).

A “recently separated veteran” means any veteran who served on active duty in the U.S. military, ground, naval, or air service during the one year period beginning on the date of such veteran’s discharge or release from active duty.

“Other protected veteran” means any other veteran who served on active duty in the U.S. military, ground, naval, or air service during a war or in a campaign or expedition for which a campaign badge has been authorized, other than a special disabled veteran, veteran of the Vietnam era, or recently separated veteran.

Basic Provisions/Requirements

Section 4212 requires covered contractors and subcontractors to take affirmative steps to employ qualified Vietnam era, special disabled, recently separated, and other protected veterans. This obligation covers the full range of employment and personnel practices, such as recruitment, hiring, rates of pay, upgrading, and selection for training. As part of this obligation, contractors must list most job openings with the local office of the State Employment Service or with DOL’s America’s Job Bank. The State Employment Service must give veterans’ priority when making referrals for job openings.

The regulations implementing Section 4212 include the obligation to refrain from discrimination in employment against protected veterans. The regulations also require all covered contractors and subcontractors to include a specific equal opportunity clause in each of their nonexempt contracts and subcontracts. The regulations provide the required language for this clause.

Covered contractors and subcontractors are also required to make reasonable accommodations for the known physical or mental limitations of qualified individuals with disabilities, unless providing an accommodation would create an undue hardship. In addition, covered contractors and subcontractors are required to take all necessary actions to ensure that no one attempts to intimidate or discriminate against any individual for filing a complaint or participating in a proceeding under Section 4212.

Under Section 4212, each employer that has both (1) a federal contract or subcontract of \$50,000 or more and (2) 50 or more employees must prepare, implement, and maintain a written affirmative action program covering each of its establishments. The employer must review and update the program annually, and it must be available for inspection by any employee or applicant for employment, as well as by OFCCP. The program may be integrated with, or kept separate from, any other affirmative action program the employer is required to prepare.

Employee Rights

Employees of and applicants for employment with a covered contractor or subcontractor have the right to file a complaint with OFCCP if they believe that the contractor or subcontractor has discriminated against them on the basis of veteran's status. Such complaints may be filed online at www.dol.gov/esa/regs/compliance/ofccp/pdf/pdfstart.htm.

Anyone may call OFCCP with a question about interpreting the regulations, filing a complaint, or any other related matter. The main telephone numbers for OFCCP's national offices are 202-693-0101 and 202-693-1308 (TTY).

Compliance Assistance Available

More detailed information, including copies of explanatory brochures and regulatory and interpretative materials, may be obtained from the OFCCP Web site (www.dol.gov/esa/ofccp) or by contacting OFCCP's local offices (www.dol.gov/esa/contacts/ofccp/ofcpckeyp.htm).

Penalties/Sanctions

OFCCP investigates for violations of the Act either through compliance evaluations or in response to complaints. If a violation is found, OFCCP may ask the federal contractor or subcontractor to enter into conciliation negotiations. If conciliation efforts fail, OFCCP may initiate an administrative enforcement proceeding by filing an administrative complaint against the contractor or subcontractor.

If OFCCP files an administrative complaint, the contractor or subcontractor has 20 days to request a review by an administrative law judge (ALJ), who hears the case and recommends a decision. DOL's Administrative Review Board issues final decisions. If the contractor or subcontractor is dissatisfied with the ALJ's decision, it may appeal the decision to the Board.

If the Board finds that the contractor or subcontractor has violated Section 4212, it may order the contractor or subcontractor to provide appropriate relief, which may include restoration of back pay and employment status and benefits for the victim(s) of discrimination. Depending upon the circumstances, violations also may result in cancellation, suspension, or termination of contracts, withholding of progress payments, and debarment.

Relation to State, Local and Other Federal Laws

Section 4212 and its implementing regulations apply only to the specific state or local government entities that participate in work on or under a federal contract or subcontract. The coverage is narrower than that which applies to employers in the private sector.



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