CAUSE OF ACTION GUIDE

TITLE VII

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DISPARATE TREATMENT

A. Elements of Claim

1. Title VII prohibits disparate treatment in terms and conditions of employment based on race, color, gender, national origin, and religion. A plaintiff can make out a disparate treatment claim by direct or indirect evidence. Cases of direct evidence disparate treatment claims are rare. The most common disparate treatment claims are based on indirect or circumstantial evidence.

2. In a case where a plaintiff has direct evidence of discriminatory animus – like a statement by a supervisor attributing a change in terms and conditions specifically based on a person’s protected trait – it is well established that such direct evidence establishes a prima facie case for the plaintiff and the burden of production and persuasion automatically shifts to the employer-defendant to show a legitimate, non-discriminatory reason(s) for its challenged actions.

3. In a disparate treatment claim based on indirect or circumstantial evidence, there is a well-established burden shifting approach for analyzing such claims established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Under the McDonnell Douglas approach, the plaintiff first must establish a prima facie claim of disparate treatment based on a protected trait covered by Title VII. If the plaintiff succeeds, the employer-defendant must come forward with a legitimate, non-discriminatory reason for the challenged action. This is only a burden of production, not persuasion. Once the employer makes this showing, the burden shifts back to the plaintiff to establish that the legitimate, non-discriminatory reason is a cover, or a pretext, for discriminatory animus. This is a burden of persuasion, not simply production.
4. In order to establish a prima facie case of disparate treatment discrimination under *McDonnell Douglas*, plaintiff must show: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he suffered an adverse employment action; and (4) the circumstances of the adverse employment action give rise to an inference of discrimination.

5. An adverse action can take many forms, including but not limited to a change in hours, pay, benefits, position, and employment. The change must have a material adverse effect on the individual’s employment.

6. In meeting the fourth prong, a plaintiff often alleges that other employees, not in the same protected class, were treated more favorably than plaintiff was. The other employees are referred to as comparators.

7. Assuming a plaintiff can establish the elements of a prima facie case, the employer-defendant must produce a legitimate, non-discriminatory reason for the challenged action. Since this is only an obligation of production, most employer-defendants are able to meet this burden.

8. Then, a plaintiff is forced to prove that a discriminatory motive was the real reason for the employer-defendant’s challenged action. A plaintiff may attempt to do this by discrediting the reason proffered by the employer-defendant by contradictory record evidence or showing that comparators not in the protected class were treated differently and more favorably. A plaintiff’s subjective disbelief of the employer-defendant’s legitimate reason, however, is not sufficient.

**B. Legal and Factual Defenses**

1. Procedural

   a. Before bringing a Title VII claim in court, a plaintiff must file a charge with the EEOC or state fair employment practices deferral agency and receive a right to sue letter. This exhaustion requirement is intended to provide the EEOC or the state deferral agency with time to investigate and possibly conciliate a charge of discrimination.

   b. Where there is a state deferral agency, an individual has 300 days of the challenged action in which to file a charge. If there is no deferral agency, then an individual only has 180 days. Once the EEOC issues a right to sue letter, an individual has 90 days in which to file a lawsuit.

   c. If a plaintiff does not file a charge or fails to meet these limitations periods, a plaintiff’s lawsuit is subject to dismissal on procedural
grounds. These defenses can be raised by motion or stated as affirmative defenses in an answer.

2. In addition to procedural defenses, an employer-defendant will want to proffer a legitimate, non-discriminatory reason for the challenged action. Doing so often requires differentiating between the treatment of a plaintiff and comparators plaintiff identifies. The more you can establish that the plaintiff and any comparators are not similarly situated, the greater likelihood you have in defeating a disparate treatment claim under Title VII.

3. Alternatively, if you can establish that the employer-defendant has been consistent in its treatment of all employees, including plaintiff, that type of showing also increase the likelihood of defeating a disparate treatment claim.

C. Key Issues for Discovery

1. As in any discrimination case, it is advantageous to take the plaintiff’s deposition first and before any witnesses of the employer-defendant are deposed. By doing so, you lock the plaintiff in on his allegations of disparate treatment and you can then educate and effectively prepare the witnesses of the employer-defendant for their depositions.

2. Written discovery can also shed light on the grounds for the alleged disparate treatment, especially if a plaintiff kept a journal or took contemporaneous notes regarding the alleged disparate treatment. These types of documents often contain helpful material for cross-examination during either a deposition or trial.

D. Practice Tips & Things to Think About

1. Make sure the employer-defendant promptly issues a document hold notice to key custodians upon receipt of a demand letter, discrimination charge, or complaint.

2. If you are retained at the charge stage to prepare a response, make sure you interview the key decisionmakers and review the key documents. This review will allow you to assess strengths and weaknesses very early in the matter and submit an effective position statement. Because there is often a delay between the disposition of an administrative charge and the commencement of litigation, a well-prepared position statement can be an effective means of memorializing the facts and arguments you will rely on in the defense of any subsequent litigation.

3. If you are retained at the lawsuit stage, you will want to collect and review all key documents and interview all key decisionmakers. Again, this will assist you in evaluating the strengths and weaknesses of the case and formulate possible case-handling options.
4. Depending on the results of your initial case review, you can then assess whether the case contains a factual record that supports an effective litigation strategy or an early resolution would be advantageous.

5. Each client can have a different philosophy when it comes to defending against employment discrimination matters. Some clients prefer to settle matters rather quickly than contest them to avoid defense costs. Others will actively defend all employment matters to deter copycat charges or litigation. As you formulate your case-handling strategies, you will need to be mindful of these different client philosophies.

E. Remedies

1. Back Pay
   a. Equitable remedy available under 42 U.S.C. § 2000e-5(g)(1). Although not “automatic or mandatory,” the Supreme Court has held that back pay awards are an integral part of the primary objective of Title VII to deter unlawful employment practices. See Albemarle Paper Co., v. Moody, 422 U.S. 405, 415-17 (1975). Accordingly, “given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.” Id. at 421. A court must “carefully articulate its reasons” if it declines to award back pay. Id. at 421, n.14.
   b. In addition to lost wages or salary, back pay may include other lost monetary benefits, including but not limited to: overtime, shift differentials, raises, vacation pay, sick pay, other fringe benefits, pension and retirement plan benefits, bonuses, etc. See, e.g., Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1562 (11th Cir. 1986); Rasimas v. Michigan Dep’t of Mental Health, 714 F.2d 614, 626 (6th Cir. 1983).
   c. Limited to two years – “Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. 42 U.S.C. § 2000e-5(g)(1).
   d. “Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.” Id.

2. Front pay
   a. Equitable remedy available under 42 U.S.C. § 2000e-5(g)(1) in lieu of reinstatement (e.g., where reinstatement is not feasible “because
of continuing hostility between the plaintiff and the employer or its workers, or because of psychological injuries that the discrimination has caused the plaintiff”). Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 853, 121 S. Ct. 1946, 1952 (2001).

3. Compensatory and Punitive Damages
   c. Punitive Damages – Recoverable if plaintiff shows the defendant acted “with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” 42 U.S.C. § 1981a(b)(1).
   d. Statutory Caps – The amount of compensatory damages (“for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses,” and the amount of punitive damages shall not exceed the following caps provided in 42 U.S.C. § 1981a(b)(3):

<table>
<thead>
<tr>
<th>Employers with ____ employees</th>
<th>Statutory Cap</th>
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<tbody>
<tr>
<td>A. More than 14, fewer than 101</td>
<td>$50,000</td>
</tr>
<tr>
<td>B. More than 100, fewer than 201</td>
<td>$100,000</td>
</tr>
<tr>
<td>C. More than 200, fewer than 501</td>
<td>$200,000</td>
</tr>
<tr>
<td>D. More than 500</td>
<td>$300,000</td>
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4. Attorneys’ Fees – “In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.” 42 U.S.C. § 2000e-5(k).

5. Other equitable remedies, such as injunctive relief, reinstatement, hiring, promotion, etc. 42 U.S.C. § 2000e-5(g)(1).

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1 The number of employees “in each of 20 or more calendar weeks in the current or preceding calendar year.” Id.
II. DISPARATE IMPACT

A. Elements of Claim

1. If an employer uses criteria for employment actions that have the effect of disqualifying or limiting individuals in one or more groups protected under Title VII based on race, color, religion, sex, or national origin, such criteria may be challenged based on “disparate impact” or “adverse impact” without evidence of intentional discrimination. The 1991 amendment of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2, requires the plaintiff to show that:

   a. the employer “uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.”

   b. “each particular challenged employment practice causes a disparate impact,” but if “the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.”

2. If the employer defends by proving that the challenged practice is job related for the position in question and consistent with business necessity, the plaintiff must show that the employer refuses to adopt an “alternative employment practice” with less adverse impact.

3. In practical terms:

   a. The plaintiff must:
      i. allege coverage by the Civil Rights Act of 1964, as amended;
      ii. identify the particular employment policy challenged;
      iii. specify the protected class that has been disproportionately affected; and
      iv. specify the adverse effect this protected group has experienced.

   b. The plaintiff should:
      i. further identify when the policy was implemented and
      ii. provide any statistical data that would help establish that this policy has resulted in an adverse impact.

B. Legal and Factual Defenses

1. For Title VII claims, the employer may defend by identifying failures in the plaintiff’s prima facie case, and by proving that the challenged practice is job-related and justified by business necessity. The employer’s Title VII burden of proving job-relatedness to rebut a claim of disparate impact is
greater than its burden of merely showing a legitimate, nondiscriminatory reason in response to a claim of discriminatory treatment. After the Supreme Court in Ward’s Cove Packing v. Atonio, 490 U.S. 642 (1989), narrowly construed the employer’s exposure to disparate-impact liability under Title VII, the 1991 amendment to Title VII amended 42 U.S.C. 2000e-2 to override Ward’s Cove and make the business necessity defense more difficult for employers.

2. Typically, after the employer offers evidence defending business necessity, the plaintiff will assert that the employer could have used an equally useful alternative with less adverse impact, and the employer must then show that the suggested alternative was not equally useful, or was not feasible, or would not have had less adverse impact.

3. **Defense Issues:**
   
a. **Did the plaintiff sufficiently identify a “particular employment practice that causes a disparate impact”?** 42 U.S.C. 2000e-2 requires identification of a specific employment practice alleged to have disparate impact, unless the plaintiff can show that the elements of the employer’s decisionmaking process cannot be analyzed separately. Vague allegations may be insufficient after Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).
   
b. **Is the evidence of disparate impact accurate and relevant?** Statistical evidence offered to show disparate impact may be challenged for accuracy and relevance, and statistical experts may be challenged under Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593-94 (1993). See, e.g., EEOC v. Freeman, 778 F.3d 463, 467-68 (4th Cir. 2015) (aff’g summary judgment against EEOC disparate impact claim and excluding EEOC’s statistical expert testimony as “rife with analytical errors” and “completely unreliable”).
   
c. **Is the challenged practice job related for the position in question and consistent with business necessity?** After the plaintiff makes a prima facie showing of disparate impact, the employer may defend by making a showing of a “business necessity” for the practice or practices that is not based on protected status but on a genuine business need and has a manifest relationship to the employment in question or a demonstrable relationship to successful performance of the jobs for which the practice is used. Griggs v. Duke Power Co., 401 U.S. 424, 429-430 (1970). The employer’s Title VII/ADA burden of proving job-relatedness to rebut a claim of disparate impact is greater than its burden of merely showing a legitimate,
nondiscriminatory reason in response to a claim of discriminatory treatment.

d. **Did the employer properly decline to use “alternative employment practices” suggested by the plaintiff?** Under *Albemarle Paper Co. v. Moody*, 422 U. S. 405, 425 (1975), if an employer meets its burden by showing that its practice was job-related, the plaintiff is required to show a legitimate alternative that would have resulted in less discrimination. The complaining party must show “that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate interest” 422 U. S. at 425. Plaintiffs often suggest that some untried alternative would have produced less adverse impact (*e.g.*, lower passing scores on tests may produce higher minority pass rates, substituting aerobic fitness measures for measures of strength may produce higher female pass rates, etc.). Such alternatives can be rejected if they are not feasible or at least equally related to the business justification for the practice.

C. **Key Issues for Discovery**

1. Does the plaintiff meet qualifications for the job other than the challenged practice?

2. What specific practice is challenged?

3. How is the challenged practice related to the job?

4. What is the business need for the challenged practice?

5. What are the relative success rates under the challenged practice for the plaintiff’s protected group compared to other groups?
   a. Is data available to permit meaningful comparisons?
   b. Is the number of decisions under the challenged practice large enough for differences in selection ratio to be statistically significant?
   c. Do changes in the challenged practice affect the alleged disparate impact?

6. Does the alleged disparate impact depend on inappropriate aggregation of data?
   a. Aggregation over time may be inappropriate if the challenged practice or the jobs for which it was used changed.
   b. Aggregation over multiple jobs may be inappropriate.

7. Does the employer’s use of the challenged practice satisfy the Uniform Guidelines on Employee Selection Procedures?
8. Is the challenged practice a professionally developed test?
   a. Proper job analysis?
   b. Evidence of validity?
      i. Does the challenged practice depend on transported validity evidence?
   c. Evidence of reliability?
   d. Evaluation of fairness?
   e. Consideration of alternatives?

9. Rule 702 issues for expert testimony
   a. Data accuracy
   b. Accepted analytical techniques
   c. Expertise – generally strong academic credentials
   d. Prior testimonial experience in similar litigation
   e. Skeletons in the closet?
   f. Sufficient understanding of the employment issue to place the statistical testimony in context?

D. Practice Tips & Things to Think About

1. How Iqbal and Twombly affect pleading of disparate impact is not clear.
   a. In Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) and Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), the Supreme Court introduced a new “plausibility” pleading requirement: “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” Iqbal, 556 U.S. at 678.
   b. It’s easy for a plaintiff to claim disappointment after an adverse employment action, but not so easy for a plaintiff to identify a “particular employment practice that causes a disparate impact.” Disparate impact is typically the subject of expert testimony after discovery, and a generic allegation of non-specific disparate impact may warrant an Iqbal motion to dismiss.

2. Test-sellers often make bold claims that their tests have had little or no adverse impact and that prior validity studies are easily transported for the customer’s use.
   a. Test sellers frequently furnish data from prior use of their tests that, in the seller’s opinion, proves the test will not have adverse impact. Such representations should be viewed skeptically, because many valid tests of knowledge, skills, and other abilities have disparate impact on one or more protected groups. Cf. Ricci v. DeStefano, 557 U.S. 557, 129 S.Ct. 2658, 2680 (2009) (recognizing testimony that “adverse impact in standardized testing has been in existence since
the beginning of testing”). It is imprudent to assume that all groups will pass a purchased test at identical rates after sufficient data has been collected to analyze selection rates.

b. The Uniform Guidelines on Employee Selection Procedures permit an employer to rely on validity data from development and use elsewhere, if specific conditions for transporting such data are met; but each employer is required to collect data from its own use of the selection procedure to determine whether its use has adverse impact. An employer may use an employment test while collecting impact data, but if the employer’s use of a test results in disparate impact, the employer (not the test-seller) must prove the business necessity of the test, and must show acceptable evidence of validity and reliability beyond the test-seller’s claims.

3. Proving the business necessity and validity of a challenged practice is important, but might not be sufficient.

a. In Title VII cases, after the employer shows the business necessity for a job related practice, the plaintiff may offer self-serving and speculative testimony that some magic test would have been equally useful with less adverse impact. Many “experts” are available to testify that the employer could have used alternatives with lesser adverse impact, as in *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658 (2009). The Court held that demonstration of “an equally valid, less-discriminatory testing alternative” required more than “brief mention of alternative testing methods” by a “direct competitor” “marketing his services for the future.” 129 S.Ct. at 2680.
III. HOSTILE WORK ENVIRONMENT

A. Elements of Claim

1. Plaintiff is a member of a protected class;

2. Plaintiff was subjected to inappropriate and unwelcome conduct (verbal or physical);

3. Directed at Plaintiff’s protected category (race, sex, religion, national origin, disability);

4. That is sufficiently severe or pervasive to unreasonably interfere with work or which creates an intimidating, hostile, or offensive work environment;

5. Employer liability
   a. Respondeat superior for supervisor harassment;
   b. Employer knew or should have known and failed to take action for co-worker harassment.

B. Legal and Factual Defenses

1. The conduct was not unwelcome.
   a. The conduct was mutual.
   b. Plaintiff engaged in similar conduct.

2. The conduct was not directed at a particular protected status.
   a. A supervisor who is particularly tough on all employees and even makes the workplace “hostile” due to toughness (i.e., the “equal opportunity jerk”), if not targeted to a specific protected category, is not actionable.
   b. Jokes, statements, pictures while unwelcome, are not actionable if they do not implicate a protected status.

3. The conduct was not sufficiently severe or pervasive to create a hostile work environment.
   a. Isolated statements and/or actions may not be sufficiently pervasive.
   b. Petty slights and minor annoyances may not be sufficiently severe.

4. The conduct was not both objectively and subjectively offensive.
5. For co-worker harassment:
   a. The employer did not know of the harassment, nor should it have
      known of the harassment.
   b. The employer took prompt, remedial action.

6. Affirmative Defense (Faragher/Ellerth defense)
   a. Supervisor conduct
      i. Employer exercised reasonable care to prevent and/or
         correct harassing behavior; and
      ii. Employee unreasonably failed to use preventative or
          corrective opportunities that were communicated to the
          employee.
      iii. Note: an employee qualifies as a “supervisor” for Title VII
          purposes only when the employer has empowered that
          individual to take tangible employment actions against the
          victim, i.e., to effect a significant change in employment
          status, such as hiring, firing, failing to promote, reassignment
          with significantly different responsibilities, or a decision
          causing a significant change in benefits.
   b. Key Point: The law requires the employer to investigate and take
      appropriate action.

C. Key Issues for Discovery

1. Was there a written policy on harassment?
   a. Was it adequately communicated to employees?
   b. Did Plaintiff receive a copy?
   c. Did the employer conduct training on the policy?
   d. Did the plaintiff understand how to report harassment?

2. Who engaged in harassing behavior?
   a. Supervisor?
   b. Co-worker?
   c. Third party?

3. Did Plaintiff register a complaint with anyone?

4. What was the nature of the complaint?
a. What was the alleged conduct?
b. How often did it happen?

5. Did management know?
a. Should management have known?
   i. How?

6. Was any investigation conducted?
a. By whom?
b. Notes?
c. Who interviewed?

7. Was any action taken?
a. Anyone disciplined?

8. Has this happened before?
a. Same harasser?
b. Same victim?

9. Who spoke to complaining party?

10. Any evidence this was “welcome” or “mutual” conduct?
a. Did Plaintiff engage in any similar conduct or indicate the conduct was not subjectively offensive?
b. Check Plaintiff’s social media posts for evidence of Plaintiff’s conduct or state of mind.

11. Could Plaintiff still perform his/her job duties?

12. Is Plaintiff claiming compensatory damages? If yes:
   a. Get copies of medical records.
   b. Check Plaintiff’s medical history for other potential traumatizing incidents.
   c. During discovery, check for any traumatic events in the past:
      i. loss of family member
      ii. divorce
      iii. accident
      iv. incarceration
      v. victim of a crime

13. Is there any after-acquired evidence of misconduct that might limit damages?

14. Make sure to cover job search/mitigation of damages in discovery.
D. Practice Tips & Things to Think About

1. Is there an individual defendant in addition to the corporate client?
   a. Should we consider separate counsel?
   b. Should we still get waiver of conflict signed even if we plan to represent both?

2. Always do a FOIA request to the EEOC and the state deferral agency. Usually, it proves worthless but it can help you hone in on the issues the Plaintiff feels are important.

3. Is there insurance coverage for the claim? If yes, will they:
   a. Cover the individual defendant?
   b. Want separate counsel?
   c. What are the policy exclusions?
   d. What is the retention?
   e. Are there special billing instructions?

4. If the case is settled, remember to add Medicaid language for the agreement.

5. Electronic discovery may be critical. Need to issue record hold when charge filed, not when lawsuit filed.

6. Be meticulous in Plaintiff’s deposition and get every situation the employee feels was harassing.

7. Assess settlement early on, before the parties are too entrenched in their positions.

E. Remedies

1. Same as for Disparate Treatment claims. See Section I.E above.
IV. RETALIATION

Title VII prohibits employers from discriminating against employees or applicants for employment because the individual has opposed any practice made an unlawful employment practice under the statute, or because the individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the statute. 42 U.S.C. §2000e-3(a).

A. Elements of Claim

1. In *University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013) the Supreme Court held that Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in §2000e-2(m). Thus, Title VII retaliation claims require proof that the desire to retaliate was the “but-for cause” of the challenged employment action. This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action(s) of the employer. 133 S.Ct. at 2533.

2. When evaluating a retaliation claim for purposes of summary judgment, many courts continue to articulate two ways a plaintiff may prove a retaliation claim – the direct and indirect methods of proof.

   a. Under the direct method of proof, to present a prima facie case of retaliation, plaintiffs must show that: (i) they engaged in statutorily protected conduct (either opposition or participation); (ii) they experienced an adverse employment action; and (iii) there is a causal connection between the adverse employment action and the protected conduct. *See, e.g.*, *Boston v. U.S. Steel Corporation*, 816 F.3d 455 (7th Cir. 2016); *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 657 (5th Cir. 2012); *Moore v. City of Philadelphia*, 461 F.3d 331, 340-41 (3d Cir. 2006).

      i. To establish the causal link, plaintiffs can rely on direct or circumstantial evidence. Direct evidence is evidence that points directly to a retaliatory motive without inference. Circumstantial evidence is proof of a fact, or a series of facts, that tends to show some other fact is true.

      ii. Courts hold that circumstantial evidence may permit a trier of fact to infer retaliation by an employer. Types of such circumstantial evidence include suspicious timing, evidence that similarly situated employees were treated differently, and evidence that the employer’s proffered reason for the adverse employment action was pretextual. *See, e.g.*, *Coleman v. Donahoe*, 667 F.3d 835, 860 (7th Cir. 2012)
b. Under the indirect method of proof, some courts hold that to present a prima facie case of retaliation, plaintiffs must show that: (i) they engaged in statutorily protected activity; (ii) they met their employer’s legitimate expectations; (iii) they suffered an adverse employment action; and (iv) they were treated less favorably than similarly situated employees who did not engage in protected activity. See, e.g., *Boston v. U.S. Steel Corporation*, 816 F.3d 455 (7th Cir. 2016).

c. Other courts hold that a prima facie case of retaliation is established by the plaintiffs showing that: (i) they engaged in protected activity; (ii) the employer knew about that activity; (iii) the employer thereafter took an adverse employment action; and (iv) there was a causal connection between the protected activity and the adverse action. See, e.g., *Kwan v. Andalex Group LLC*, 737 F.3d 834 (2d Cir. 2013); *Polk v Yellow Freight Sys, Inc.*, 876 F.3d 527, 531 (6th Cir 1989).

d. Other courts hold that a prima facie case of retaliation is established by the plaintiffs showing that: (i) they engaged in protected activity; (ii) the employer thereafter took an adverse employment action; and (iii) there was a causal connection between the protected activity and the adverse action. See, e.g. *Young v. City of Philadelphia*, 651 Fed. Appx. 90 (3d Cir. 2016); *Ward v. Jewell*, 772 F.3d 1199 (10th Cir. 2014).

3. To establish an adverse employment action, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405 (2006). Petty slights and trivial annoyances do not normally qualify as actionable retaliation. *Id.* at 68.

4. To rebut the employee’s prima facie case, the employer may provide a legitimate, nonretaliatory reason for the adverse action. This is merely a burden of production, not of proof. After the employer meets its burden of production, the employee must prove that the employer’s reason is a pretext for unlawful retaliation. *Davis v. Fort Bend Cnty.*, 765 F.3d 480, 490 (5th Cir. 2014), *cert. denied sub nom. Fort Bend Cnty., Tex. v. Davis*, No. 14-847, 2015 WL 223592 (U.S. June 8, 2015).

B. Legal and Factual Defenses

1. Before bringing a Title VII retaliation claim, a plaintiff ordinarily must file a charge of discrimination with the EEOC or state FEP agency and receive a right to sue notice. The federal and state agencies have time limits by which
plaintiffs must file their charges to preserve their claims. If a plaintiff does not file a charge or fails to file within the required period, the claim is subject to dismissal, and this issue can be raised by motion or affirmative defense. See, e.g., Mandel v. M & Q Packaging Corp., 706 F.3d 157, 164 (3d Cir. 2013) (affirming dismissal of plaintiff’s retaliation claim under Title VII for failure to exhaust administrative remedies).

a. In a state deferral agency, an individual has 300 days in which to file the charge. If there is no deferral agency, then the individual has 180 days to file. 42 U.S.C. § 2000e-5(e)(1).

i. This limitations period begins to run from the time the plaintiff “knows or reasonably should have known that the challenged act has occurred.” Vadie v. Miss. State Univ., 218 F.3d 365, 371 (5th Cir. 2000) (citations omitted).

ii. A continuing violation theory can be used for some employment actions to expand these periods.

b. Generally, filing a charge with the state will result in the charge being automatically filed with the EEOC under a work sharing agreement between the agencies.

c. After the EEOC issues a right to sue notice, the individual has 90 days in which to file a lawsuit based on that charge. 42 U.S.C. § 2000e-5(f); Taylor v. Books A Million, Inc., 296 F.3d 376, 379 (5th Cir. 2002).

2. Because Title VII retaliation claims are subject to the but-for causation standard of proof, the mixed motive affirmative defense (i.e., that defendant would have taken the same employment action in the absence of the unlawful animus) is not applicable and should not be raised as an affirmative defense.

C. Key Issues for Discovery

1. Serve your written discovery early and schedule the plaintiff’s deposition a couple weeks after plaintiff’s discovery responses are due. Save the critical questions for the plaintiff’s deposition (instead of interrogatories) to prevent the plaintiff’s attorney from answering them.

2. In the plaintiff’s deposition, if the plaintiff testifies as to who knew of his/her protected activity, challenge the plaintiff on the basis for his/her knowledge if the issue is in dispute. The plaintiff’s belief is often based on assumptions or hearsay.

3. If the plaintiff is supporting his/her retaliation claim based on the treatment of comparators, ask the plaintiff in his/her deposition who the comparators
are, how the plaintiff knows of the comparators’ treatment, and if the plaintiff knows whether the comparators ever engaged in protected activity.

D. Practice Tips & Things to Think About

1. Often, a retaliation claim raised in a complaint exceeds the scope of the claim raised in the charge. For example, the charge alleges certain adverse employment actions but the lawsuit alleges different actions or additional actions. Research within your jurisdiction whether new claims raised in the complaint are subject to dismissal. Additionally, get a copy of the EEOC or state investigative file through a FOIA request to determine the scope of the charge investigation.

2. The decisionmaker’s lack of knowledge of the protected activity can be key to defending a retaliation claim. Early in the case, carefully examine all written communications and emails to determine if/when the decisionmaker(s) learned of the protected activity. If the protected activity is the filing of a charge, find out how the company was served with the charge, to whom it was directed, and by whom received. If the protected activity was an internal complaint, find out to whom the complaint was made and who that person notified of the complaint. Conduct your own investigation into the decisionmaker’s knowledge by reviewing all paper trails, including emails.

3. If the protected activity is the employee’s internal complaint of discrimination, ask the plaintiff in his/her deposition the exact words used to lodge the complaint. Also, carefully prepare company witnesses on the complaint made to them, to ensure they are precise in recounting the words used by the employee to complain. Generally, to constitute protected activity, the complaint must implicate some characteristic protected by Title VII (e.g. sex, race). A general complaint of unfairness, without linking that unfairness to some protected characteristic, may not rise to the level of the necessary protected activity to sustain a retaliation claim.

4. The timing of the protected activity can be critical. Obviously, if the adverse employment action preceded the protected activity, the employment action could not have been motivated by the protected activity. Establish that timeline through emails and other documents.

5. A litigation hold needs to be issued when the demand letter, charge of discrimination, or complaint is first received.
CAUSE OF ACTION GUIDE

ADA

A. Elements of Claim

To state a claim for failure to provide a reasonable accommodation under the ADA, an employee\(^1\) must prove the following six elements by a preponderance of the evidence:

1. Employee has a “disability”;
   a. A “disability” is defined as (a) a physical or mental impairment that substantially limits the employee’s ability to engage in one or more major life activities, (b) having a record of such an impairment, or (c) being “regarded as” having the impairment. See 42 U.S.C. § 12102(1).
   b. Major life activities include, but are not limited to:
      i. “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working,” 42 U.S.C. § 12102(2)(A) (as amended by the ADA Amendments Act of 2008 (ADAAA)), or
      ii. “the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” 42 U.S.C. § 12102(2)(A) (as amended by the ADAAA).
   c. In a “regarded as” situation, it may be sufficient to establish that the impairment was regarded as substantially limiting.

2. Employee is a “qualified individual” able to perform the “essential functions” of the job or position sought or which he/she already fills;
   a. To show Employee was a “qualified individual,” Employee must show that he or she has the skill, experience, education, and other

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\(^1\) While the term “employee” is used throughout this Guide, an applicant who failed to be hired may be substituted for “employee.”
requirements\(^2\) for the job and could do the job’s “essential functions,” either with or without reasonable accommodation.

3. Employer knew or reasonably should have known about the employee’s disability;


4. Employer was informed of the employee’s need for an accommodation due to the disability,\(^3\)

5. Providing an accommodation(s) would be (or would have been) reasonable, meaning the cost of providing that accommodation would not have clearly exceeded its benefits;

   a. For case law supporting the cost/benefit definition of “reasonable,” see *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1184 n.10 (6th Cir. 1996); *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995).

   b. The EEOC takes the position that an accommodation is “reasonable” if it “appears to be ‘feasible’ or ‘plausible’” and would be effective in meeting the needs of the individual. See EEOC: *Enforcement Guidance: Reasonable Accommodation and Undue Hardship*.

6. Employer failed to provide, or failed to make a good faith effort to provide, a reasonable accommodation.

**B. Legal and Factual Defenses**

1. Procedural – Exhaustion of Administrative Remedies

   a. Before bringing an ADA claim in court (whether for failure to accommodate or an actual discrimination claim), a plaintiff must file

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\(^2\) For example, an individual cannot establish that he or she was qualified for a position if he or she does not have licenses or certificates required for the position. See, e.g., *Bay v. Cassens Transp. Co.*, 212 F.3d 969, 974 (7th Cir. 2000) (holding that ADA plaintiff was not qualified to perform the essential functions of a commercial truck driver because he did not possess the required DOT certification) (“[W]e will not look behind [plaintiff’s] initial inability to attain certification and second-guess the medical determination of [a doctor].”); *Mason v. Durham Transp. Inc.*, 265 F.3d 1059 (5th Cir. 2001) (affirming ruling that former bus driver was not qualified to perform his job under the ADA where job required him to operate a commercial motor vehicle and former bus driver could not obtain a valid commercial driver’s license due to visual impairment); *Daugherty v. City of El Paso*, 56 F.3d 695, 697 (5th Cir. 1995) (holding that ADA plaintiff was not qualified to perform the essential functions of a city bus driver because he was not physically qualified under 49 C.F.R. § 391.41).

\(^3\) A request for a particular or specific accommodation is not required; this element is usually satisfied if the employer was informed of the employee’s basic need for an accommodation.
a charge with the EEOC or state fair employment practices deferral agency and receive a right to sue letter. This exhaustion requirement is intended to provide the EEOC or the state deferral agency with time to investigate and possibly conciliate the charge.

b. Where there is a state deferral agency, an individual has 300 days from the challenged action in which to file a charge. If there is no deferral agency, then an individual only has 180 days. Once the EEOC issues a right to sue letter, an individual has 90 days from the date of receipt of the letter in which to file a lawsuit, unless there is a basis for tolling that time period. See 42 U.S.C. § 2000e-5(f).

c. If a plaintiff does not file a charge or fails to meet these limitations periods, a plaintiff’s lawsuit is subject to dismissal on procedural grounds. These defenses can be raised by motion or stated as affirmative defenses in an answer.

2. Employer’s Lack of Awareness of the Disability

   a. If the employee does not ask for an accommodation, the employer does not have to provide one unless it knows of the disability. Hedberg v. Indiana Bell Tel. Co., Inc., 47 F.3d 928, 934 (7th Cir. 1995). However, if a disability and the need to accommodate it are obvious, the law does not always require an applicant or employee to expressly ask for a reasonable accommodation. Id.

      i. In some circumstances, courts have imposed a duty on employers to offer a reasonable accommodation if the employer knew or reasonably should have known that the employee had a disability and needed an accommodation. See, e.g., Brady v. Wal-Mart Stores, Inc., 531 F.3d 127, 135 (2d Cir. 2008) (holding that employers are obligated to engage in the interactive process to provide a reasonable accommodation, regardless of whether the employee has asked for an accommodation, “if the employer knew or reasonably should have known that the employee was disabled”).

   b. Furthermore, if the disability makes it difficult for the applicant or employee to communicate his or her needs, an employer must make a reasonable effort to understand those needs, even if they are not clearly communicated. For example, an employer should start communicating with an employee if it knows that he or she might be mentally disabled. See Bultemeyer v. Fort Wayne Cnty. Schs., 100 F.3d 1281, 1285-86 (7th Cir. 1996); 29 C.F.R. § 1630.2(o)(3)).
3. **Interactive Process**

   a. The appropriate reasonable accommodation is best determined through a flexible, *interactive process* that involves both the employer and the individual with a disability. 29 C.F.R. pt. 1630, App. § 1630.9 (2011). Both Employer and Employee must cooperate in this interactive process in good faith, once the employer has been informed of the Employee’s request for a reasonable accommodation.

      i. Generally, the employee must notify the employer of the need for a reasonable accommodation and initiate the interactive process. See, e.g., *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042 (6th Cir. 1998).

   b. Failure to cooperate in the interactive process is not *per se* dispositive of a reasonable accommodation claim. However, proof of such conduct by either party is highly relevant in such cases and a jury will be instructed to consider whether a party cooperated in this process in good faith when evaluating the merit of that party’s claim that a reasonable accommodation did or did not exist.

4. **Direct Threat**

   The ADA provides this affirmative defense if the employment or accommodation of an otherwise qualified, disabled individual would pose a “direct threat” to the individual or to others. The “direct threat” affirmative defense is applicable both to disparate treatment claims and reasonable accommodation claims. See *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002); *Buskirk v. Apollo Metals*, 307 F.3d 160, 168 (3d Cir. 2002). The employer claiming the direct threat defense must prove by a preponderance of the evidence that the employee posed a direct threat to the health or safety of himself or others that could not be eliminated by a reasonable accommodation. Factors that a finder of fact may consider in determining whether an individual poses a direct threat include:

   a. the nature and severity of the potential harm;

   b. the duration of the potential harm;

   c. the imminence of the potential harm; and

   d. the probability of the harm occurring.

   See 42 U.S.C. §§ 12111(3) (defines direct threat), 12113(b) (provides that a qualification standard can include a condition that a person not pose a direct threat); *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987); see also *NINTH CIRCUIT COURT OF APPEALS MANUAL OF MODEL CIVIL JURY INSTRUCTIONS*, § 12.12 (“ADA – Defenses – Direct Threat”).
5. **Undue Hardship**

This affirmative defense is available (and should be used) when the Employer contends that providing an accommodation would cause an undue hardship on the operation of its business. Typically, an “undue hardship” is something so costly or so disruptive that it would fundamentally change the way the Employer runs its business. See 42 U.S.C. § 12111(10) and 29 C.F.R. pt. 1630, App. § 1630.2(p). The factors used to determine undue hardship include:

a. The nature and cost of the accommodation.

b. The Employer’s overall financial resources. This might include the size of its business, the number of people it employs, and the types of facilities it runs.

c. The financial resources of the facility where the accommodation would be made. This might include the number of people who work there and the impact that the accommodation would have on its operations and costs.

d. The way that the Employer conducts its operations. This might include its workforce structure; the location of its facility where the accommodation would be made compared to the Employer’s other facilities; and the relationship between or among those facilities.

e. The impact of the accommodation on the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business.

6. **Essential Functions**

While not *per se* treated as an affirmative defense, employers bear the burden of establishing the “essential functions” of the job(s) the employee was allegedly denied or dismissed for failure to accommodate. When evaluating whether a job function is essential, “consideration shall be given to the employer’s judgment as to what functions of a job are essential . . .” 42 U.S.C. § 12111(8); accord Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 807-08 (5th Cir. 1997). Factors to be considered by the finder of fact include:

a. Whether the reason the position exists is to perform that function;

b. Whether there are a limited number of employees available among whom the performance of that job function can be distributed;

c. Whether the job function is highly specialized, and the person in that particular position is hired for his or her expertise or ability to perform the particular function;
d. The amount of time spent performing the job function;

e. The consequences of not requiring the individual holding the position to perform the function;

f. The terms of any collective bargaining agreement;

g. The work experience of past employees who have held the position; and

h. The work experience of current employees that hold similar position(s).

C. Key Issues for Discovery

1. As in any discrimination case, it is advantageous to take the plaintiff’s deposition first and before any witnesses of the employer-defendant are deposed. By doing so, you lock in the plaintiff’s allegations of failure to accommodate and you can then educate and effectively prepare your witnesses for their depositions. Similarly, early written discovery should be used to uncover documents regarding the plaintiff’s underlying impairment and his or her basis for needing the alleged accommodation.

2. Discovery issues unique to ADA accommodation claims include early assessment of your own client’s efforts to engage in the interactive process, including:

   a. Does the employer have an ADA policy, including a policy or practice for handling accommodation requests?
      i. Was the policy or practice communicated to the employee?
      ii. Did the employee use that policy in this case?
      iii. Did the employer follow its own policy and was its conduct appropriately documented?

   b. Did the employer work with entities specializing in the placement of individuals with disabilities, such as state vocational rehabilitation agencies or the Department of Labor’s Office of Workers’ Compensation Programs?

   c. Was the requested accommodation necessary for the employee to perform one or more “essential functions” of the job?
      i. If the employer failed to offer the requested accommodation, did it have a defensible reason for doing so, e.g., the
accommodation was (1) not effective, (2) too expensive, or (3) too disruptive?

ii. Did the employer offer another or different reasonable accommodation? If so, would it have been effective?

iii. If the employer failed to offer another accommodation (or simply one of its own choosing), was there a reasonable accommodation it could have offered that could have effectively accommodated the plaintiff’s disability?

a) This analysis may prove key to defending cases where the employer failed to engage (at all or sufficiently) in the interactive process.

d. Disability Benefits vs. Claimed Ability to Perform Essential Functions

i. Although an award of Social Security disability benefits and an ADA accommodation claim are no longer presumptively deemed mutually exclusive, see Cleveland v. Policy Management Systems, 526 U.S. 795, 119 S.Ct. 1597 (1999), an SSDI claim may genuinely conflict with an ADA claim. So, discovery regarding the plaintiff’s SSDI claim, as well as any statements made to the Social Security Administration, may prove crucial in determining whether the plaintiff even states a claim for failure to accommodate. For example, an ADA plaintiff’s sworn assertion in an application for disability benefits that she is unable to work appears to negate the essential element of her ADA claim that she can perform the essential functions of her job, and a court should require an explanation of this apparent inconsistency. To defeat summary judgment, the plaintiff’s explanation must be sufficient to warrant a reasonable juror’s conclusion that, assuming the truth of, or the plaintiff’s good faith belief in, the earlier statement to the SSA, the plaintiff could nonetheless perform the essential functions of her job, with or without reasonable accommodation. Cleveland, 119 S.Ct. at 1603-1604.

ii. Discovery should be conducted regarding all claims made for short-term disability and long-term disability benefits with any prior employer or under any other private insurance plan.

e. In cases involving an acute or chronic medical condition, the employee’s course of medical treatment and related medical records
may become the subject of intense scrutiny during discovery. In such cases:

i. You should seek the employee’s medical records from any provider who may have delivered treatment for the impairment or any conditions created or affected by the impairment.

ii. Depending on the scope and complexity of the medical records, you should consider engaging a non-testifying expert to evaluate the records to determine, among other things, whether the employee’s condition was consistent with the accommodation he or she sought, or whether any reasonable accommodation was possible given the circumstances of the underlying impairment.

D. Practice Tips & Things to Think About

1. Previous accommodation provided. The fact that an employer may have offered certain accommodations to employees in the past does not mean that the same accommodations must be forever extended to an employee or that those accommodations are necessarily reasonable under the ADA. Nevertheless, in preparing a defense, the Employer must be prepared to put on evidence to explain its decision not to offer the accommodation in the present case.

2. On a related subject, accommodations offered to certain classes of employees (such as temporary accommodations to workers injured on the job), do not necessarily require the employer to offer the same or similar accommodations to a disabled employee whose disability was not work-related, provided the employer can demonstrate that offering the accommodation is not otherwise reasonable.

3. Remember that a plaintiff who refuses to participate in the interactive process may not base an ADA claim on the failure of that process. The plaintiff “bears the burden of proposing an accommodation that would enable him [or her] to perform [the] job effectively and is, at least on the face of things, reasonable.” Kvorjak v. Maine, 259 F.3d 48, 55 (1st Cir. 2001).

   a. By the same token, an employer who fails to engage in the process (or gives up too soon), may be liable for a failure to engage in that process if the plaintiff can demonstrate that “had a good faith interactive process occurred, the parties could have found a reasonable accommodation that would enable the disabled person to perform the job’s essential functions.” Kvorjak, 259 F.3d at 52.
b. Similarly, while the ADA itself does not specifically provide that the employer has an obligation to engage in the interactive process with the employee to determine whether a reasonable accommodation can be found for the employee’s disability, good faith participation in an interactive process is an important factor in determining whether a reasonable accommodation exists. See Williams v. Philadelphia Housing Auth., 380 F.3d 751, 772 (3d Cir. 2004). Nonetheless, proof the employee could have been reasonably accommodated but for the employer's lack of good faith is an essential element of the claim.

4. Once the plaintiff has met his or her burden to prove that a reasonable accommodation existed, the burden shifts to the defendant to prove that the proposed accommodation would have been an undue hardship. Reed v. LePage Bakeries, Inc., 244 F.3d 254, 258-60 (1st Cir. 2001).

5. An employer is not required to agree to any accommodation requested by the plaintiff, even if demonstrably reasonable. But in doing so, to avoid liability (and absent an undue hardship defense), the employer must establish that it offered or made available an effective accommodation (which the plaintiff refused to accept).

6. Telecommuting is becoming a more frequently requested reasonable accommodation. Where the essential functions of an employee’s job require in-person visits and interaction with clients or customers, telecommuting may not be a reasonable accommodation. See EEOC v. Ford Motor Co., 782 F.3d 753 (6th Cir. 2015). The decision of whether telecommuting could still allow an employee to perform essential functions is highly fact specific. Factors to consider include whether face-to-face interaction and coordination with other employees is required, whether in-person interaction is needed with clients or customers, and whether the position requires access to paper documents or other tools that are only located inside the workplace.

7. Unpaid leave may be a reasonable accommodation if an employee has exhausted accrued paid leave and federally-granted leave and such leave would permit the employee to perform satisfactorily when returning to work. Leave requested for an indefinite period of time is likely not reasonable and could impose an undue burden on the employer. Whitaker v. Wisconsin Dep’t of Health Servs., 849 F.3d 681 (7th Cir. 2017).
II. ADA DISCRIMINATION

A. Elements of Claim

An employee must prove the following elements by a preponderance of the evidence:

1. Employee has a “disability”;  
   a. A “disability” is defined as (a) a physical or mental impairment that substantially limits the employee’s ability to engage in one or more major life activities, (b) having a record of such an impairment, or (c) being “regarded as” having the impairment. See 42 U.S.C. § 12102(1). Major life activities include, but are not limited to:
   i. “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working,” 42 U.S.C. § 12102(2)(A) (as amended by the ADA Amendments Act of 2008 (ADAAA)), or  
   ii. “the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” 42 U.S.C. § 12102(2)(A) (as amended by the ADA Amendments Act of 2008 (ADAAA)).  
   b. In a “regarded as” situation, it may be sufficient to establish that the impairment was regarded as substantially limiting.  

2. Employee is a “qualified individual” able to perform the “essential functions” of the job or position sought or which he/she already fills, with or without “reasonable accommodation”;  
   a. To show Employee was a “qualified individual,” Employee must show that he or she has the skill, experience, education, and other requirements for the job and could do the job’s “essential functions,” either with or without reasonable accommodation.  

3. Employee’s disability was a motivating factor in Employer’s decision to engage in adverse action (e.g., failure to hire, demotion, termination) against the Employee.

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4 While the term “employee” is used throughout this Guide, an applicant who failed to be hired may be substituted for “employee.”
B. Legal and Factual Defenses

1. Procedural – Exhaustion of Administrative Remedies

a. Before bringing an ADA claim in court (whether a failure to accommodate or a discrimination claim), a plaintiff must file a charge with the EEOC or state fair employment practices deferral agency and receive a right to sue letter. This exhaustion requirement is intended to provide the EEOC or the state deferral agency with time to investigate and possibly conciliate the charge.

b. Where there is a state deferral agency, an individual has 300 days of the challenged action in which to file a charge. If there is no deferral agency, then an individual only has 180 days. Once the EEOC issues a right to sue letter, an individual has 90 days from the date of receipt of the letter in which to file a lawsuit, unless there is a basis for tolling that time period. See 42 U.S.C. § 2000e-5(f).

c. If a plaintiff does not file a charge or fails to meet these limitations periods, a plaintiff’s lawsuit is subject to dismissal on procedural grounds. These defenses can be raised by motion or stated as affirmative defenses in an answer.

2. Pretext vs. Mixed-motive Cases

All Circuit Courts of Appeal have applied Title VII standards to disparate treatment cases under the ADA. See Raytheon Co. v. Hernandez, 540 U.S. 44, 50, n.3 (2003). Therefore, courts have similarly applied Title VII’s “mixed-motive” and “pretext” delineations for ADA discrimination claims.

a. Pretext cases. If the evidence of disability discrimination is only circumstantial (i.e., there is no “direct” evidence of discrimination), then the Employer can argue that there was no discriminatory animus at all, and that its employment decision can be explained completely by a non-discriminatory motive; it is then for the Employee to show that the alleged non-discriminatory motive is a pretext. Thus, a typical ADA “pretext” case is considered under the McDonnell-Douglas burden-shifting analysis. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

b. Mixed-motive cases. Following the Supreme Court’s rulings in Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009), and

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5 Under the mixed motive rubric, if the plaintiff has produced “direct evidence” of the employer's discriminatory animus, then the burden of proof shifts from the plaintiff to the employer to prove that its motives for the employment action were “mixed”; i.e., while some motives were discriminatory, the employer had legitimate non-discriminatory motives as well which would have resulted in the adverse employment action. See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Thus, in such cases, the ultimate burden is on the employer to persuade the fact...
Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013), it is unclear whether the so-called “mixed motive” analysis under Title VII applies to ADA cases.

i. Applying the logic of Gross v. FBL Financial Services, Inc., the First, Fourth, Sixth, and Seventh Circuits have held that the ADA does not authorize mixed-motive disability discrimination claims. Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 317-21 (6th Cir. 2012) (en banc); Serwatka v. Rockwell Automation, Inc., 591 F.3d 957 (7th Cir. 2010); cf. Palmquist v. Shinseki, 689 F.3d 66, 72-74 (1st Cir. 2012) (holding that the Rehabilitation Act (borrowing from the ADA) does not authorize mixed-motive disability discrimination claims); Gentry v. E.W. Partners Club Mgmt. Co., 816 F.3d 228 (4th Cir. 2016). By disallowing a “mixed-motive” instruction, these cases rely on the ADA’s bar against discrimination “because of” an employee's disability, as opposed to Title VII’s “motivating factor” test, thereby requiring a “but-for” cause for the employer’s adverse decision to be actionable.

ii. Other courts of appeals have not yet addressed whether mixed-motive discrimination claims are available under the ADA since the Supreme Court issued its opinion in Gross. See Wesley-Dickson v. Warwick Valley Cent. Sch. Dist., 586 F. App’x 739, 745 n.3 (2d Cir. 2014) (“This ‘but-for’ standard might also apply to her ADA retaliation claim. . . . We need not decide that question . . . .”); Oehmke v. Medtronic, Inc., 844 F.3d 748, 759 n.6 (8th Cir. 2016) (“Gross’s reasoning arguably could be extended to the comparable “on the basis of” language in the ADA. . . . we decline to address this important question at this time.”); THIRD CIRCUIT COURT OF APPEALS MODEL CIVIL JURY INSTRUCTIONS, § 9.1.1 (“Elements of an ADA Claim - Disparate Treatment – Mixed-Motive”) (“The Committee has not attempted to determine what, if any, implications Gross and Nassar have for ADA claims, but the Committee suggests that users of these instructions should consider that question.”).

finder that it would have made the same employment decision regardless of its discriminatory animus. See, e.g., Armbruster v. Unisys Corp., 32 F.3d 768, 778 (3d Cir. 1994) (overruled by Gross v. FBL Financial Servs., Inc., 557 U.S. 167 (2009) with respect to its holding that the Price Waterhouse mixed-motive framework applied to ADEA cases).
3. **Affirmative and Other Defenses**

a. **Direct Threat.** The ADA provides this affirmative defense if the employment or accommodation of an otherwise qualified, disabled individual would pose a “direct threat” to the individual or to others. The “direct threat” affirmative defense is applicable both to disparate treatment claims and reasonable accommodation claims. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002); *Buskirk v. Apollo Metals*, 307 F.3d 160, 168 (3d Cir. 2002). The employer claiming the direct threat defense must prove by a preponderance of the evidence that the employee posed a direct threat to the health or safety of himself or others that could not be eliminated by a reasonable accommodation. Factors that a finder of fact may consider in determining whether an individual poses a direct threat include:

i. the nature and severity of the potential harm;

ii. the duration of the potential harm;

iii. the imminence of the potential harm; and

iv. the probability of the harm occurring.

*See 42 U.S.C. §§ 12111(3) (defines direct threat), 12113(b) (provides that a qualification standard can include a condition that a person not pose a direct threat); School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987); see also NINTH CIRCUIT COURT OF APPEALS MANUAL OF MODEL CIVIL JURY INSTRUCTIONS, § 12.12 (“ADA – Defenses – Direct Threat”).*

When addressing a direct threat, an employer need only rely on an “objectively reasonable” opinion, rather than an opinion that is correct. *Michael v. City of Troy Police Dep’t*, 808 F.3d 304 (6th Cir. 2015) (employer relied on opinion of psychologist who said employee may be a threat to himself or others, while employee’s doctor said he was fit for duty).

b. **Business Necessity.** This defense is applicable in cases where the employee challenges an across-the-board rule or practice that disqualified the plaintiff from consideration for the position. This affirmative defense requires the employer to prove that the policy or practice is/was:

i. Uniformly applied;

ii. Job-related for the position in question;
iii. Consistent with business necessity; and

iv. Cannot be met by a person with plaintiff’s disability even with reasonable accommodation.

See 42 U.S.C. § 12113(a) (describing defenses and terms); 29 C.F.R. § 1630.15(c) (2011) (describing the four elements a defendant must prove to overcome burden); see also NINTH CIRCUIT COURT OF APPEALS MANUAL OF MODEL CIVIL JURY INSTRUCTIONS, § 12.11 (“ADA – Defenses – Business Necessity”)

C. **Key Issues for Discovery**

1. Because ADA cases generally adopt the same procedures and remedies scheme used in Title VII discrimination claims (see discussion, above), the same discovery issues typically arise in ADA discrimination cases as in Title VII litigation.

   a. As in any discrimination case, it is advantageous to take the plaintiff’s deposition first and before any witnesses of the employer-defendant are deposed. By doing so, you lock in the plaintiff’s disparate treatment allegations and can then educate and effectively prepare the employer’s witnesses for their depositions.

   b. Written discovery can also shed light on the grounds for the alleged disparate treatment, especially if a plaintiff kept a journal or took contemporaneous notes regarding the alleged disparate treatment. These types of documents often contain helpful material for cross-examination during either a deposition or trial.

2. Early in the litigation it is important to discern whether the dispute involves fundamental questions of the existence of an ADA disability, which may include a “regarded as” or “history of” condition. If those issues exist, then the unique discovery issues applicable to failure to accommodate claims come into play (see ADA Reasonable Accommodation Cause of Action Checklist).

3. However, where these issues are undisputed (i.e., the employer does not dispute that the employee has an ADA disability), then the usual Title VII issues of motive and proof will predominate the case and the course of discovery.

   a. A typical ADA discrimination claim may involve an employee claiming that his or her layoff was motivated by animus towards the employee’s disability. Therefore, direct and indirect evidence of discrimination will be relevant factors for establishing (or disputing) a prima facie case.
b. The employer’s motivation/reason for the adverse employment decision should be firmly determined before any discovery takes place, and employer witnesses must be interviewed and prepped (as the case may be) to ensure the consistency of that reason or reason(s). If there is inconsistency among the witnesses’ recollections, then the focus of discovery must be to highlight a plausible explanation for those inconsistencies. Because the usual Title VII “shifting of burdens” test applies in these cases, the plaintiff will be focused on eliciting evidence sufficient to convince the judge to deny summary judgment and allow a jury to decide whether the employer’s proffered “legitimate and nondiscriminatory reason(s)” should be disbelieved.

D. Practice Tips & Things to Think About

1. Unlike a typical Title VII disparate treatment case, where the plaintiff’s protected status is usually an open and obvious fact, an ADA plaintiff’s protected status is not necessarily known or obvious to the employer. Thus, wherever possible, determining whether and/or when the employer had knowledge of the employee’s ADA disability may be a critical factor in the case.

   a. Due to the broadening of the definition of a disability, more “hidden” disabilities, such as mental illness, diabetes, and HIV/AIDS are covered under the ADAAA.

2. Similarly, although less useful following the 2008 amendments in the ADAAA, whether an employee was disabled at all, or met the criteria for a “qualified” person with a disability, should be addressed early in the litigation. Despite the broadened definitions under the ADAAA, for there to be liability the employee must be “substantially limited” in a major life activity.

3. Keep in mind that the ADAAA changed the landscape for disabilities of short duration. While a plaintiff cannot be “regarded as” disabled if he or she has a “transitory and minor” impairment (which Congress defined as having “an actual or expected duration of six months or less”) the same is not necessarily true for “actual” disabilities. The EEOC has taken the position that even impairments that last only for a short period of time, while typically not covered, may be covered if sufficiently severe. See Summers v. Altarum Inst., Corp., 740 F.3d 325 (4th Cir. 2014) (where an employee with leg injuries affecting his ability to walk for seven months, though not permanent or chronic, was found to have an impairment equating to a disability).

4. Episodic conditions or those that are in remission may be covered disabilities even if they do not impact an employee’s ability to work when the conditions or disorders are inactive. See Mazzeo v. Color Resolutions
Int’l, LLC, 746 F.3d 1264 (11th Cir. 2014); Gogos v. AMS Mechanical Systems, Inc., 737 F.3d 1170 (7th Cir. 2013). Episodic conditions that could substantially limit a major life activity when active include irritable bowel syndrome, depression, kidney stones, back conditions, fibromyalgia, and Hepatitis C.

5. The ADAAA has expanded the definition of major life activities. An employee suffering from a mental illness or other psychological disorder can be substantially impaired in the major life activity of “interacting with others.” See Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562 (4th Cir. 2015). Other major life activities included under the ADAAA include concentrating and thinking, sleeping, learning, reading, communicating, and caring for oneself.
CAUSE OF ACTION CHECKLIST

ADEA

I. DISPARATE TREATMENT

“Disparate treatment” occurs when the employer “treats some people less favorably than others because of their [protected characteristics].” Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (quotation omitted). Specifically under the ADEA, it is unlawful for an employer to “fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, employment agencies and labor organizations.” 29 U.S.C. § 623(a)(1).

A. Elements of Claim

To prevail on a claim of age discrimination under the ADEA, an employee must demonstrate (1) he or she was an employee or applicant covered by the Act; (2) he or she was discharged or suffered other adverse employment action, such as demotion, by an employer covered by the Act; and (3) that age was the determining factor in the termination decision, i.e., “but for” age, the employee would not have been subjected to the adverse employment action. See Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009). The employee must prove through direct or circumstantial evidence that the discrimination was intentional.

When making his or her ADEA case through circumstantial evidence, the plaintiff must use the burden-shifting framework of McDonnell Douglas Corp. v. Green to create an inference of unlawful discrimination. 411 U.S. 792 (1973); see also O’Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 (1996). Under the McDonnell Douglas paradigm, an employee

1 The Supreme Court has not definitely resolved whether the McDonnell Douglas framework applies to ADEA claim, but most circuit courts continue to apply it to age discrimination cases in the wake of Gross v. FBL Financial Services, Inc. See, e.g., Jackson v. Cal-W. Packaging Corp., 602 F.3d 374, 378 (5th Cir. 2010) (citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 129 S.Ct. 2343, 2349 n. 2 (2009)); Smith v. City of Allentown, 589 F.3d 684, 691 (3d Cir. 2009) (“While we recognize that Gross expressed significant doubt about any burden-shifting under the ADEA,
must first demonstrate a prima facie case of age discrimination by showing by a preponderance of the evidence four essential elements:

1. He or she is a member of the protected age group (i.e., 40 years old or older);

2. He or she suffered an adverse employment action, such as termination or demotion (or failure to hire or promote);

3. At the time of termination, he or she was adequately performing his or her job at a level that met the employer’s legitimate expectations (or was qualified for the position or promotion sought); and

4. The adverse employment action occurred under circumstances that raise a reasonable inference of unlawful age discrimination, such as being replaced by a substantially younger person.

See, e.g., Grant v. City of Blytheville Arkansas, 841 F.3d 767 (8th Cir. 2016); Kosak v. Catholic Health Initiatives of Colorado, 400 Fed. Appx. 363, 365-66 (10th Cir. 2010). In McDonnell Douglas, the Supreme Court noted that the elements required for a plaintiff’s prima facie case may vary depending on the context of the claim and nature of the alleged conduct. 411 U.S. at 802 n. 13. As a result, the circuits have utilized a number of variations of the test. See, e.g. Goudeau v. National Oilwell Varco, L.P., 793 F.3d 470, 474 (5th Cir. 2015)(plaintiff must show “(1) he was discharged; (2) he was qualified for the position; (3) he was within the protected class at the time of discharge; and (4) he was either i) replaced by someone outside the protected class, ii) replaced by someone younger, or iii) otherwise discharged because of his age.”); Simpson v. Franciscan Alliance, Inc., 827 F.3d 656, 661 (7th Cir. 2016)(plaintiff must show he was (1) member of a protected class, (2) meeting his employer’s legitimate expectations, (3) suffered an adverse employment action, and (4) a similarly situated employee not in the protected class was treated more favorably); Willis v. UPMC Children’s Hospital of Pittsburgh, 808 F.3d 638, 644 (3d Cir.

we conclude that the but-for causation standard required by Gross does not conflict with our continued application of the McDonnell Douglas paradigm in age discrimination cases.”)
plaintiff must show he was (1) at least 40, (2) suffered an adverse employment action, (3) was qualified, and (4) replaced by another sufficiently younger individual so as to support and inference of discriminatory motive.

The elements of a prima facie case are different when the plaintiff’s employment termination arose from a reduction-in-force. To establish a prima facie case under the ADEA in the context of a structural reorganization or a company-wide reduction in force, a plaintiff must demonstrate that (1) he or she was a member of the protected age group, (2) he or she was adequately performing his or her job at a level that met the employer’s legitimate expectations, (3) he or she experienced an adverse employment action, and (4) either that the employer did not treat age neutrally or that younger persons were retained in the same position. See Del Valle – Santana v. Servicios Legales De Puerto Rico, Inc., 804 F.3d 127 (1st Cir 2015); Woodman v. Haemonetics Corp., 51 F.3d 1087, 1091 (1st Cir.1995); see also Sullivan v. Worley Catastrophe Services LLC, 591 Fed. Appx. 243, 246 (5th Cir. 2014) (“In a reduction-in-force case, a plaintiff makes out a prima facie case by showing (1) that he is within the protected age group; (2) that he has been adversely affected by the employer's decision; (3) that he was qualified to assume another position at the time of the discharge; and (4) ‘evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.’”) (quoting Nichols v. Loral Vought Sys. Corp., 81 F.3d 38, 41 (5th Cir. 1996) and Amburgey v. Corhart Refractories Corp., Inc., 936 F.2d 805, 812 (5th Cir.1991)); Rahl v. Mo-Tech Corp., Inc. 642 F.3d 633, 637 (8th Cir. 2011)(plaintiff in RIF must prove he was member of a protected class, he met applicable job qualifications, he suffered an adverse employment action, and there is additional evidence that age was a factor in the employer’s action); Anderson v. Consolidated Rail Corp., 297 F.3d 242, 249 (3d Cir. 2002)(plaintiff in RIF must prove she was a member of a
protected class, was qualified for the position, suffered an adverse employment action, and the employer retained a sufficiently younger employee).

If the plaintiff establishes a prima facie case, the burden shifts to the employer “to articulate some legitimate, nondiscriminatory reason” for its action. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817. “[S]hould the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.” *Texas Dep't of Cnty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). “If a plaintiff fails to establish a prima facie case, however, the court need not reach the second and third steps and may grant summary judgment in favor of the defendant.” *Kosak*, 400 Fed. Appx. at 365 (citing *Adamson v. Multi Cnty. Diversified Servs., Inc.*, 514 F.3d 1136, 1146 (10th Cir.2008) (“In the absence of facts tending to establish this initial inference, plaintiff is not entitled to the presumption of discrimination and a defendant is not required to defend against the charge.”)).

**B. Legal and Factual Defenses**

1. **After-acquired evidence**

An employer may rely on evidence of an employee’s wrongdoing, which was discovered only after the employee’s termination, to limit its exposure to liability for age discrimination. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), *on remand*, 51 F.3d 272 (6th Cir. 1995) (finding after-acquired evidence of wrongdoing does not prevent an employee from suing under the ADEA but substantially limits the damages the employee can recover).

2. **Age as bona fide occupational qualification (BFOQ).**

Employers may discharge employees over 40 who are otherwise covered under the Act if the employer can demonstrate that age is a “bona fide occupational qualification reasonably necessary to the normal operation of the particular business.” 29 U.S.C. § 623(f)(1). The Supreme
Court has established a two-prong test for evaluating the BFOQ defense: (1) the job qualifications must be reasonably necessary to the essence of the employer’s business; and (2) the employer must show either that all or substantially all the persons excluded are unable to perform the job safely and efficiently or that it is highly impracticable to test them on an individual basis. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412-17 (1985).

3. **Bona fide seniority system**

   The ADEA protects actions taken “to observe the terms of a bona fide seniority system that is not intended to evade the purposes of [the Act], except that no such seniority system shall require or permit the involuntary retirement of any individual [otherwise covered by the Act] because of the age of such individual.” 29 U.S.C. § 623 (f)(2)(A).

4. **Employer’s legitimate nondiscriminatory reasons for discharge**

   Under the *McDonnell Douglas* paradigm, if the employer meets its burden of production by demonstrating a legitimate, non-discriminatory reason for the termination, “the presumption raised by the prima facie case is rebutted and ‘drops from the case.’” *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 201 (4th Cir. 1997) (quoting *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n. 10 (1981)).

5. **Reasonable factor other than age (RFOA)**

   The ADEA provides that “[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age.” 29 U.S.C. § 623 (f)(1). According to the regulations, an employment practice is based on a RFOA when it is reasonably designed and administered to achieve a legitimate business purpose in light of the circumstances, including its potential harm to older workers. The regulations emphasize the need for an individualized consideration of the facts and
circumstances surrounding the particular situation, and include the following list of considerations relevant to assessing reasonableness:

- The extent to which the factor is related to the employer’s stated business purpose;

- The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;

- The extent to which the employer limited supervisors’ discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;

- The extent to which the employer assessed the adverse impact of its employment practice on older workers; and

- The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.

29 C.F.R. §1625.7.

6. Same-actor inference

Some circuits recognize that in cases where the hirer and firer are the same individual and the termination occurs within a relatively short time space following hiring, a strong inference exists that discrimination was not a determining factor for the adverse employment action. See, e.g., Bradley v. Harcourt, Brace and Co., 104 F.3d 267, 270–71 (9th Cir.1996) (“[W]here the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive.”); Russell v. McKinney Hosp. Venture, 235 F.3d 219, 228 n. 16 (5th Cir. 2000)(same actor inference arises when individual who allegedly discriminates against the plaintiff was the same individual who hired plaintiff and gives rise to an inference that discrimination was not the
motive); Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir.1996) (“This ‘same actor’ inference has been accepted by several other circuit courts, and we now express our approval.”); Evans v. Technologies Applications & Service Co., 80 F.3d 954, 959 (4th Cir.1996) (“[B]ecause Houseman is the same person who hired Evans, there is a powerful inference that the failure to promote her was not motivated by discriminatory animus.”) (internal quotation and citation omitted); Ripberger v. Corizon, Inc., 773 F.3d 871 (7th Cir. 2014) (notion that decision maker desired to eliminate plaintiff because of her age is unlikely given that he hired plaintiff just two years earlier); E.E.O.C. v. Our Lady of Resurrection Med. Ctr., 77 F.3d 145, 152 (7th Cir.1996) (“The same hirer/firer inference has strong presumptive value.”).

II. DISPARATE IMPACT

“Disparate impact” occurs when the employer’s employment practices are “facially neutral in their treatment of different groups but . . . in fact fall more harshly on one group than another and cannot be justified by business necessity.” Hazen Paper, 507 U.S. at 609.

A. Elements of Claim

1. Proof of discriminatory motive (or intent) is not required for a disparate impact claim.

2. Plaintiff asserting a disparate impact claim must isolate and identify the specific employment practices that are allegedly responsible for any observed statistical disparity on older workers; it is not enough to simply allege that there is a disparate impact on older workers or point to a generalized policy that may have led to such disparity. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); see also Smith v. Jackson, 544 U.S. 228 (2005) (finding that a disparate impact claim is cognizable under the ADEA under § 623(a)(2)).
B. Legal and Factual Defenses

1. Reasonable factor other than age (RFOA)

The ADEA provides that “[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age.” 29 U.S.C. § 623 (f)(1). Even after a prima facie case is established, if an employer then shows that the challenged employment practice is “based on reasonable factors other than age” (commonly abbreviated RFOA), a disparate impact claim cannot survive. In *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84, 128 S. Ct. 2395 (2008), the Supreme Court held that the RFOA exemption for disparate impact claims under the ADEA is an affirmative defense on which the employer bears both the burden of production and the burden of persuasion.

III. RETALIATION

The ADEA provides that it is an unlawful employment practice to retaliate against any employee because he or she has opposed a discriminatory act or “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under [the ADEA].” 29 U.S.C. §623(d).

A. Elements of Claim under Direct Method of Proof

1. Plaintiff engaged in protected activity, such as filing an EEO complaint based on age discrimination; opposing or complaining about discrimination; or testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the ADEA;

2. The employer subjected the plaintiff to a materially adverse action against plaintiff (see *Burlington N. & S.F. Ry. v. White*, 126 S.Ct. 2405, 2415 (2006)); and

3. A causal connection existed between the protected activity and the adverse action.

*See also Hutt v. Abbvie Products, LLC*, 757 F.3d 687, 693 (7th Cir. 2014).
B. Elements of Claim under Indirect Method of Proof

1. Plaintiff engaged in statutorily protected activity;
2. Plaintiff met the employer’s legitimate expectations;
3. Plaintiff suffered an adverse employment action; and
4. Plaintiff was treated less favorably than similarly situated employees who did not engage in statutorily protected activity.

*Hutt v. Abbvie Products, LLC*, 757 F.3d 687, 694 (7th Cir. 2014).

IV. KEY ISSUES FOR DISCOVERY

A. Direct evidence

Direct evidence of discrimination (i.e., discriminatory statements by decisionmakers related to the adverse employment action) is almost always detrimental for an employer’s chances at getting a case dismissed on summary judgment. When facing comments that could potentially be construed as direct evidence of discrimination, an employer should:

1. Make sure the comments constitute direct evidence and are not merely stray remarks. *See, e.g., EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173, 1181 (5th Cir. 1996) (“This court has repeatedly held that ‘stray remarks’ do not demonstrate age discrimination.”) (collecting cases).

2. When deposing the plaintiff as to any age-based remarks, be sure to ask about the context of the remark, whether the plaintiff heard it first hand or was told about it, when the comment was made, and who made it. Ask the plaintiff whether he/she knows whether the declarant was a decision maker with respect to the employment action at issue, and how the plaintiff knows this. Remarks not made by decision makers or that are not connected to the employment action at issue can be found to be stray and not probative.

3. Assuming the direct evidence only stems from the plaintiff’s own, self-serving allegations, turn to cases that have held that such evidence is insufficient to overcome summary judgment. *See, e.g., Lemmons v. Georgetown Univ. Hosp.*, 431 F. Supp. 2d 76, 90 (D.D.C. 2006) (finding self-serving statements are not credible to overcome summary judgment on a case for direct evidence of discrimination); *Alfaro v. Dana Container, Inc.*, No. 04-72664, 2005 U.S. Dist. LEXIS 8336 (W.D. Mich. May 9, 2005) (finding plaintiff’s own self-serving and uncorroborated testimony as to discriminatory statements was insufficiently credible to serve as direct
B. Inadmissible evidence

When preparing for summary judgment, it is important to filter out the inadmissible portions of the plaintiff’s deposition transcript. When deposing the plaintiff, make sure you ask about the foundation for the plaintiff’s knowledge on testimony bearing directly on the plaintiff’s burden of proof. For example, if the plaintiff identifies a comparator receiving better treatment, ask the plaintiff how he/she knows about the treatment received by the comparator, what the comparator’s age is and how the plaintiff knows that, whether the plaintiff knows who made the decision with respect to the comparator’s treatment and how the plaintiff knows that. Often times these questions reveal that the plaintiff lacks a foundation for his/her testimony or it is based on speculation or hearsay. Once identified, this type of inadmissible evidence should be addressed in a reply brief (and in some jurisdictions through a motion to strike) if the plaintiff attempts to rely on the hearsay statements made during the deposition.

C. Statistical evidence

A plaintiff can use statistical evidence to help establish a prima facie case of discrimination, but the Supreme Court has noted that “statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.” Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 340, 97 S. Ct. 1843, 1856-57 (1977). An employer may respond to a prima facie case based on statistical evidence either by casting doubt on the reliability of the plaintiff’s statistical evidence

When seeking to cast doubt on the reliability of the Plaintiff’s statistical evidence, some questions for defendants\(^2\) to consider include:

1. What is the source of the data? Are the underlying data accurate?
2. Is the size of the statistical sample too small to be of meaningful value?
3. Does the Plaintiff’s analysis accurately reflect the relevant labor market?
4. Do the statistics fail to reflect variables (e.g., education, prior work experience, etc.) that may explain the alleged disparity?
5. Are the plaintiff’s statistics unreliable due to the inclusion of obfuscating variables? For example, statistics based on an applicant pool containing individuals lacking minimal qualifications for the job in dispute are of little probative value. Dorsey v. Pittsburgh Associates, 90 Fed. App’x. 636 (3d Cir. 2004).
7. Does the plaintiff’s statistical evidence contain any other methodological or analytical deficiencies (e.g., using one set of statistics for skilled and non-skilled jobs)?
8. If the plaintiff uses statistics like the percentage of those 40 years of age or older selected for a RIF, what was the percentage of employees 40 years of age or older prior to the RIF? If an employer has a predominantly older workforce, the fact that a large percentage of them are selected for the RIF becomes less probative of age discrimination. Conversely, if the percentage chosen for the RIF is lower than the percentage that existed prior to the RIF,

\(^2\) Defendants should consider retention of a statistician as an expert witness as early as possible, when necessary, to rebut the Plaintiff’s statistical evidence. For more information about retaining experts, including strategy, pros, and cons, see Expert Witnesses in Employment Litigation.
the defendant may have powerful evidence establishing the lack of discriminatory intent.

Be prepared for massive discovery efforts. Plaintiffs may seek records of all employees, going back a number of years, to bolster statistical evidence of discrimination. Research case law in your jurisdiction regarding the limits on discovery requests for statistical data.

Research the law in your jurisdiction regarding the weight given to statistical evidence when used to establish a prima facie case or to create a genuine issue of fact. See, e.g., Kadas v. MCI Systemhouse Corp., 255 F.3d 359, 363 (7th Cir. 2001) (“Although it is unlikely that a pure correlation, say between age and terminations, would be enough to establish a prima facie case of intentional discrimination, it would be precipitate to hold that it could never do so.”) (citing cases discussing whether statistics alone can be sufficient to establish a prima facie case).

Finally, remember that just as a plaintiff can use statistics to establish a prima facie case, a defendant can use statistics to establish the lack of discriminatory intent. See Furnco Const. Corp. v. Waters, 438 U.S. 567, 579-80, 98 S. Ct. 2943 (1978).

D. Pretext

In Reeves v. Sanderson Plumbing Products, Inc., the United States Supreme Court held that under the McDonnell Douglas scheme, a prima facie case of discrimination, combined with sufficient evidence for a reasonable fact-finder to reject the employer’s nondiscriminatory explanation for its decision, is sufficient to sustain a finding of liability for intentional discrimination. 530 U.S. 133 (2000). As such, it is imperative for the employer to keep its story straight and not deviate from the original reason for the adverse employment action. Failure to do so could result in dismissal of the motion for summary judgment. Fuentes v. Perskie, 32 F.3d 759 (3d Cir. 1994) (“[T]he non-moving plaintiff must demonstrate such . . . inconsistencies . . . in the employer’s proffered legitimate reasons . . . that a reasonable factfinder could rationally find them
‘unworthy of credence.’” Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509 (3d Cir. 1992)).

E. Relevant decisionmaker(s)

By identifying the relevant decisionmaker and demonstrating the lack of any discriminatory animus harbored by such decisionmaker (i.e., show missing nexus between the alleged remark and the adverse employment decisionmaker), an employer can further strengthen the success of prevailing on summary judgment. Additionally, in some cases, the decisionmaker may not know the plaintiff’s age, thereby providing a further argument to defeat the plaintiff’s claim.

F. Similarly situated comparators

Where the employer can demonstrate that all similarly situated employees, regardless of their membership in a protected class were treated equally, an employer’s chances of prevailing on a motion for summary judgment are strengthened. Most courts hold that a comparator must be similar in all material respects, so ensure that your discovery can differentiate the comparators relied upon by the plaintiff.

V. PRACTICE TIPS & THINGS TO THINK ABOUT

A. Coverage

The ADEA applies to any private employer engaged in an industry affecting commerce who employs 20 or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 29 U.S.C. § 630(b). After Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), enforcement of the ADEA for state employees is generally limited to enforcement actions by the EEOC. The ADEA’s definition of “employer” specifically excludes
the federal government and corporations wholly owned by the United States. 29 U.S.C. § 630(b)(2).

B. Exempt Employees

1. Any person elected to state or local public office, any person chosen by the elected official to be on his or her personal staff, and appointees at the policy-making level or immediate advisers of the elected official with respect to the constitutional or legal powers of office. 29 U.S.C. § 630(f).

2. Persons employed in bona fide executive or high policy-making positons in the 2 years immediately prior to retirement may be subject to compulsory retirement at age 65 if they are entitled to annual retirement benefits of at least $44,000. 29 U.S.C. § 631(c)(1).


4. Independent contractors are not considered covered employees under the ADEA, and in some cases, nor are partners in a partnership. See Mangram v. GMC, 108 F.3d 61 (4th Cir. 1997); Hayden v. La-Z-Boy Chair Co., 9 F.3d 617 (7th Cir. 1993) (independent contractors); Wheeler v. Hurdman, 825 F.2d 257 (10th Cir 1987) (partners). But see, EEOC v. Sidley Austin LLP, N.D. Illinois No. 05 C 0208, wherein a major issue in the case was whether partners in the law firm were protected as employees under the ADEA. Under a consent decree Sidley Austin LLP paid $27.5 million to 32 former partners who alleged they were forced out of the partnership because of their age, and the decree provides that “Sidley agrees that each person for whom EEOC has sought relief in this matter was an employee with the meaning of the ADEA.”


C. Exempt Employers

1. Employers with fewer than 20 employees. 29 U.S.C. § 630(b).

2. Indian tribes. EEOC v. Fond due Lac Heavy Equip. & Constr. Co., 986 F.2d 246 (8th Cir. 1993); EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989).

D. Remedies

The remedial provisions of the ADEA, which incorporate by reference the provisions of the FLSA, are significantly different than the remedies available under Title VII. The ADEA allows a successful age discrimination plaintiff to recover “such legal and equitable relief as may be appropriate . . . including without limitation judgments compelling employment, reinstatement or promotion.” 29 U.S.C. § 626(b); see also 29 U.S.C. § 626(c)(1). Generally, remedies under the ADEA include back pay, reinstatement or front pay, and liquidated damages equal to the amount of back pay in cases of “willful violations” of the Act. 29 U.S.C. § 216(b); see also Hazen Paper Co. v. Biggins, 507 U.S. 604, 617 (1993). A successful plaintiff under the ADEA may also recover attorneys’ fees and costs. 29 U.S.C. § 216(b).

Unlike Title VII, the ADEA does not allow for the recovery of compensatory damages for pain and suffering or the recovery of punitive damages. See, e.g., Rogers v. Exxon Research and Engineering Co., 550 F.2d 834, 842 (3d Cir. 1977) (holding that “damages for pain and suffering or emotional distress cannot properly be awarded in ADEA cases”), overruled on other grounds by Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d 1221 (3d Cir. 1978) (en banc). Also, the damage caps applicable to Title VII do not apply to damages under the ADEA.

E. Older Workers Benefit Protection Act of 1990 (OWBPA)

Under the OWBPA, employers may generally only provide reduced benefits for older employees when the actual cost of their benefits is significantly higher. 29 U.S.C. § 623(f)(2)(B). The OWBPA specifically states that “no [early retirement incentive] plan shall retire or permit the involuntary retirement of any individual . . . because of the age of such individual.” 29 U.S.C. § 623(f)(2). The Statement of Managers accompanying the Act delineates factors relevant to the issue of voluntariness: (a) whether the employee had sufficient time to consider his or her options, (b) whether accurate and complete information has been provided regarding the benefits available.
under the plan; and (c) whether there have been threats, intimidation and/or coercion. 136 Cong. Rec. S13596 (daily ed. Sept. 24, 1990).

The OWBPA also provides that an employee or former employee may not waive violations of the ADEA unless the waiver is “knowing and voluntary.” A waiver will be considered as such only if it satisfies the following requirements:

(A) the waiver must be written in a manner calculated to be understood by the employee;
(B) it must refer specifically to claims under the ADEA;
(C) the waiver must be retrospective only;
(D) the waiver must be in exchange for valid consideration in addition to anything of value to which the employee is already entitled;
(E) the employee or former employee must be informed in writing of the right to consult legal counsel before signing the waiver;
(F) the employee or former employee must be given at least 21 days to consider the waiver (or 45 days if requested in connection with an exit incentive or other employment termination program offered to a group or class of employees);
(G) the employee or former employee must have the right to revoke the waiver agreement within 7 days following its execution; and
(H) in the event the employer offers an exit incentive or other employment termination program to a group of employees, the employees must receive a full explanation of the terms of the program and at least 45 days to consider whether to participate in the program.


If the waiver is in settlement of a charge filed with the EEOC or an action filed in court by the individual alleging age discrimination, the waiver will not be considered knowing and voluntary unless at a minimum all the requirements of 29 U.S.C. § 626(f)(1)(A)-(E) are met. 29 U.S.C. § 626(f)(2). With respect to the time limits in subsections (F) and (G), the individual need only be given a reasonable period of time within which to consider the settlement agreement. Id.

If the waiver is in conjunction with an exit incentive or other employment termination program offered to a group or class of employees, the waiver must also include detailed information including “[t]he job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who
are not eligible or selected for the program.” 29 C.F.R § 1625.22(f)(1)(i)(ii). In Oubre v. Entergy Operations, the United States Supreme Court held that a release that does not comply with the stringent requirements of the OWBPA cannot bar a subsequent ADEA claim by the employee. 522 U.S. 422 (1998).

For more information, see the model OWBPA Exhibit A to Separation Agreement.

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3 PLEASE NOTE: Many jurisdictions have interpreted the OWBPA’s requirement that the employer provide information concerning the “eligibility factors” for participating in a RIF program (see 29 USC § 626 (f)(1)(H)) as simply requiring the basic eligibility factors for qualifying for a RIF package. However, a smaller number of jurisdictions have interpreted this requirement to require the disclosure of the specific selection criteria used to determine which employees were being eliminated. These “RIF Selection Factor” jurisdictions currently include (but are not necessarily limited to) the federal districts of Massachusetts, Ohio, and Minnesota. See Massachusetts v. Bull HN Info. Sys., Inc., 143 F. Supp. 2d 134, 147 (D. Mass. 2001); Faraji v. FirstEnergy Corp., 2007 U.S. Dist. LEXIS 16092, at *1, **13-15 (N.D. Ohio Mar. 7, 2007); Paglisi v. Guidant Corp., 483 F. Supp. 2d 847, 861 (D. Minn. 2007); see also Kruchowski v. Weyerhaeuser Co., 423 F.3d 1139, 1143-44 (10th Cir. 2005) (“Kruchowski I”), withdrawn and superseded by Kruchowski v. Weyerhaeuser Co., 446 F.3d 1090 (10th Cir. 2006) (“Kruchowski II”). In Kruchowski I, the Court held that the defendant’s failure to provide employees with “eligibility factors” for selection for termination (such as leadership, abilities, technical skills, and behavior) rendered the release ineffective. In Kruchowski II, however, the Court held that the release was ineffective because it did not specify the correct decisional unit. The Court did not consider (and did not overrule) its earlier holding that the release did not provide the appropriate “eligibility factors.” The Court specifically noted that “[t]he revised opinion omits any discussion of the eligibility factors issue.” Id. at 1144.
CAUSE OF ACTION GUIDE

FMLA

I. INTERFERENCE (ENTITLEMENT) CLAIM

A. Elements of Claim

1. Employee Eligible under FMLA
   a. Employed by the employer for at least 12 months as of the date leave commences. See, e.g., Walls v. Central Contra Costa Transit Authority 653 F.3d 963, 967 (9th Cir. 2011).
   b. Employed for at least 1250 hours of service during the 12 month period immediately preceding commencement of the leave.
   c. Employed at a worksite where the employer employs at least 50 employees within 75 miles.

2. Employer Covered by FMLA: At Least 50 Employees
   a. At least 50 full time or part time employees who appear on a company’s payroll during each of 20 or more calendar workweeks in the current or preceding calendar year.
   b. Employees hired or terminated in the middle of a calendar week are not counted for that week. 29 C.F.R. § 825.105(d).
   c. FMLA does not apply if the employer has less than 50 employees within 75 miles of the worksite of the employee. 29 U.S.C. § 2611(2)(B)(ii).
   d. See 29 C.F.R. §§ 825.104-105 for more information on employer coverage.

3. Employee Entitled to Leave under FMLA (See 29 U.S.C. §2612(a)(1))
   a. “Serious health condition” of the employee, defined as “an illness, injury, impairment, or physical or mental condition” that involves:
      i. “Inpatient care,” meaning “an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined in §825.113(b), or any subsequent treatment in connection with such inpatient care (29 C.F.R. § 825.114), or
      ii. “Continuing treatment by a healthcare provider,” as defined in 29 C.F.R. § 825.115.
b. “Serious health condition” of a child, spouse or parent
   i. “Spouse” means a husband or wife. A husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under State law for purposes of marriage in the state in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This includes ‘common law’ marriages and same-sex marriages.

c. Birth of a child and to care for the child. See 29 C.F.R. § 825.120 (“Leave for pregnancy or birth”).

d. Placement of a child with the employee for adoption or foster care. See 29 C.F.R. § 825.121 (“Leave for adoption or foster care”).

e. A “qualifying exigency” arising out of the fact that an employee’s family member is on Active duty in the armed forces (see 29 C.F.R. § 825.126 (“Leave because of a qualifying exigency”)); or

f. To care for an injured service member or veteran during rehabilitation (“military caregiver leave”) (29 C.F.R. § 825.127).

4. Employee Provided Sufficient Notice of Intent to Take Leave

a. May be either written or oral, by either the employee or his/her spokesperson.

b. Notice must be sufficient to let the employer know that the leave is for a FMLA-qualifying reason, although the notice need not expressly mention FMLA.

   i. “The critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employer’s request to take time off for a serious health condition.” Manuel v. Westlake Polymers Corp. 66 F.3d 758, 764 (5th Cir. 1995).

c. Duration of Leave: Employee must tell the employer what the timing and duration of the leave will be. 29 C.F.R. §825.302(c).

d. Timing of Notice: FMLA requires that employees give reasonable notice of the need to take FMLA leave. The precise timing depends on whether the need for leave is foreseeable. 29 U.S.C. § 2612(e).
5. Employer Denied FMLA Benefits to Which Employee Was Entitled.
   a. It is unlawful for an employer “to interfere with, restrain, or deny the existence of or the attempt to exercise, any right under the FMLA. 29 U.S.C. §2615 (a)(1).
      i. Interference includes discouraging employees from using FMLA leave. 29 C.F.R. §825.220(b).

See Ridings v. Riverside Medical Center 537 F.3d 755, 761 (7th Cir. 2008).

B. Legal and Factual Defenses

1. Entitlement to leave: An employer can defeat an interference claim by showing, among other things, that the employee did not take leave “for the intended purpose.” Vail v Raybestos Products Co., 533 F.3d 904, 909-10 (7th Cir. 2008).

2. Statute of Limitations
   a. 2 years following the last action alleged to have violated FMLA. 29 U.S.C. § 2617 (c)(1); 29 C.F.R. § 825.400 (b)
   b. 3 years for a “willful” violation. 29 U.S.C. § 2617(c)(2)
      i. “Either knew or showed reckless disregard for the matter or whether its conduct was prohibited by the statute.” Hanger v. Lake County 390 F.3d 579, 583 (8th Cir. 2004), citing McLaughlin v. Richland Shoe Co. 486 U.S. 128, 130, 108 S.Ct. 1677, 1680 (1988).

3. Employee Unable to Return to Work
   a. “[A]n employer can lawfully fire an employee who is unable to return to work at the end of the FMLA leave period, even if the termination occurs before the end of the period. Edgar v. JAC Products, Inc. 443 F.3d 501, 506-07 (6th Cir.2006).

   b. After-acquired evidence may be admissible to show employee’s inability to return to work. Edgar v. JAC Products, Inc. 443 F.3d 501, 512 (6th Cir.2006).

4. Employer’s Good Faith
   a. Some courts recognize: See Vail v. Raybestos Products Co. 533 F.3d 904, 909 (7th Cir. 2008) (employer did not violate FMLA by refusing to reinstate employee based on an “honest suspicion” she was abusing her leave).
b. Some courts reject: See Bachelder v. America West Airlines, Inc. 259 F.3d 1112, 1130 (9th Cir. 2001) (immaterial that employer mistakenly believed employee had exhausted her FMLA leave when firing her for unexcused absences).

C. Key Issues for Discovery

1. Independent Medical Exam (“IME”)
2. Medical Records
3. Depositions of medical professionals
4. Determine whether employee’s FMLA leave is/was for proper purpose
5. Employee’s text messages and emails, including private computers and devices
6. All purported forms and instances of requesting FMLA notice (written and oral)
7. Ability to return to work after FMLA
8. Employer’s FMLA policy
9. Notices from the Employer to the Employee of FMLA eligibility or ineligibility, employee’s responsibilities while on FMLA leave, etc. (See 29 C.F.R. § 825.300.)
10. Records of amount of leave taken

D. Practice Tips & Things to Think About

1. Interplay with the Americans with Disabilities Act and state disability laws
   a. As a practical matter, these laws may impose obligations on the employer beyond those mandated by FMLA.
2. Interplay with state leave laws (e.g., California Family Rights Act)
   a. As a practical matter, these laws may impose obligations on the employer beyond those mandated by FMLA.

II. RETALIATION

A. McDonnell Douglas Shifting Burden Test

1. Plaintiff Must Establish a Prima Facie Case of Retaliation
a. Exercise of a Protected FMLA right

i. Some, but not all, courts also require that the plaintiff show that employer knew that the employee was exercising FMLA rights. See, e.g., Donald v. Sybra, Inc. 667 F.3d 757, 761 (6th Cir. 2012); Strickland v. Water Works 239 F.3d 1199, 1202-03 (11th Cir. 2001); but see Dotson v. Pfizer, Inc. 558 F.3d 284, 295 (4th Cir. 2009) (rejecting enhanced requirement)

b. Adverse Effect on the Employee by the Employer’s Action

i. “Adverse effect” means “that a reasonable employee would have found the challenged action materially adverse.” Wierman v. Casey’s General Stores 638 F.3d 984, 999 (8th Cir. 2011); Millea v. Metro-North R.R. Co. 658 F.3d 154, 164-65 (2d Cir. 2011); Breneisen v. Motorola, Inc. 512 F.3d 972, 979 (7th Cir. 2008).

c. Causal Connection between the Employee’s Leave Request and the Employer’s Termination or Adverse Action

i. For temporal proximity to be enough to establish causal connection, the adverse employment action must occur very close in time to when the employer know of the employee’s use or planned use of FMLA leave. Sisk v. Picture People, Inc. (8th Cir. 2012) 669 F.3d 896, 900-01 (2 months was too long)

See, e.g., Hodgens v. General Dynamics Corp., 144 F.3d 151, 161 (1st Cir. 1998).

2. The Employer Must Respond with a Legitimate, Non-Retiatory Reason for Its Actions

3. Plaintiff Must Establish That the Employer’s Articulated Reason Was a “Pretext” for Unlawful Retaliation

4. A Possible Fourth Prong in “Mixed Motive” Cases

a. In some courts in a Title VII context, the Employee has been permitted to show not pretext, but that discrimination was “a” factor, but not necessarily the sole factor, for the adverse employment action.

b. In that case, the burden shifts back to the employer for a fourth prong: to prove that it would have taken the same action but for the discriminatory animus. Richardson v. Monitronics Intern., Inc.,
434 F.3d 327, 333 (5th Cir. 2005); Kohls v. Beverly Enterprises Wisconsin, Inc., 259 F.3d 799, 805 (7th Cir. 2001); Smith v. Allen Health Sysytems, Inc., 302 F.3d 827, 833-34 (8th Cir. 2002).

B. **Key Issues for Discovery**

1. Timeline issues: establish dates precisely
2. All purported forms and instances of employee requesting FMLA notice (written and oral)—with dates
3. Employer’s legitimate reasons: seek admissions and neutral corroboration of these reasons.
4. Where possible (by jurisdiction), establish additional (mixed) motivation
5. Establish existence of performance issues prior to employee’s initial FMLA request.

C. **Practice Tips & Things to Think About**

1. Retaliation cases are all about the timeline
2. Positive history of employer’s FMLA practices: if there is a history of the company taking FMLA seriously, consider using it as a defense against retaliation (balancing with other risks, such as opening up further discovery).
3. Establish existence of performance issues prior to employee’s initial FMLA request.

III. **REMETIES**

A. An employee who proves a violation of 29 U.S.C. § 2615 may obtain the following relief:

1. Compensatory damages, in an amount equal to:
   
   a. “any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation” (29 U.S.C. § 2617(a)(1)(A)(i)(I)), or
   
   b. “any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving leave under section 2612(a)(3) of this title) of wages or salary for the employee.” (29 U.S.C. § 2617(a)(1)(A)(i)(II))

3. Liquidated Damages – A showing of willfulness entitles the employee to liquidated damages in an amount equal to back pay and interest, unless the employer can show that it acted in good faith and had reasonable grounds for believing that it complied with the FMLA. 29 U.S.C. § 2617(a)(1)(A)(iii).


The following is a brief summary of Louisiana state labor and employment laws. This summary is provided for general information only and is not intended as legal advice. Employers should consult legal counsel for more specific guidance.

I. THE EMPLOYMENT RELATIONSHIP

A. Employment At Will

Louisiana law expressly grants employers and employees alike the right to terminate the employment relationship at the will of either party and without assigning cause, except where there is a contract for employment for a definite period of time or stating a just cause requirement, or a statute prohibiting termination of employees based on certain protected classifications or conduct. See, e.g. Quebedeaux v. Dow Chem. Co., 2001-2297 (La. 6/21/02), 820 So.2d 542; La. Civil Code arts. 2747 and 2749.

In Louisiana, employment contracts are either for a definite or indefinite period of time. Employment contracts for an indefinite period of time are terminable at any time for any reason and by any party. La. Civil Code art. 2747. Employment contracts for a definite period of time may be oral or written and, absent agreement to the contrary, are only terminable for cause. La. Civil Code art. 2749. An example of an oral, fixed-term employment contract is an accepted oral employment offer promising a six-month trainee position. Roussel v. James U. Blanchard & Co., 430 So.2d 247 (La. App. 4 Cir. 1983).

An employee who has been hired for a specific term and is subsequently dismissed without cause during the term is entitled to recover the full amount of the salary that the employee would have received had the employment contract not been terminated. La. Civil Code art. 2749. Such damages are treated as a penalty, and the employee does not have a duty to mitigate these damages. Andrepon v. Lake Charles Harbor and Term. Dist., 602 So.2d 704, 707 (La. 1992).

Employee handbooks generally are not deemed to be contractually binding, whether as an employment contract for a definite term or otherwise, as they are typically considered to be unilateral expressions of company policy that do not evidence a meeting of the minds. Schwarz v. Administrators of the Tulane Educ. Fund, 699 So.2d 895 (La. App. 4 Cir. 1997). There are no broad public policy exceptions to the employment at-will doctrine, though there are statutory exceptions as discussed herein.

Although it is found in the noncompetition statute, under Louisiana law, a choice of forum or choice of law provision in an employment agreement is null and void unless the employee “expressly, knowingly, and voluntarily agreed to and ratified” it “after the occurrence of the incident which is the subject of the civil or administrative action”; that is, after the events made subject of the lawsuit or other legal action. La. R.S. § 23:921(A)(2).
B. Independent Contractors

Louisiana law prohibits the misclassification of employees as independent contractors. La. R.S. § 23:1711(G). If, after investigation, the Louisiana Workforce Commission (LWC) Administrator determines that an employer failed to classify properly an individual as an employee and failed to pay the contributions required by the Louisiana Employment Security Law (unemployment tax assessments), and the failure was not knowing or willful, then the employer will receive a written warning, which constitutes a determination that the individuals listed therein are employees, resulting in contributions, interest, and penalties being due. Violations subsequent to the written warning will result in additional penalties between $250 and $1,000 per worker in addition to any contributions, interest, and penalties otherwise due. Other sanctions for subsequent violations may include imprisonment for up to 90 days and, if a knowing violation is found, the prohibition from contracting, directly or indirectly, with any state agency or political subdivision of the state for three years. Each employee so misclassified gives rise to a separate offense. Employers may request a hearing to contest an adverse determination by the Administrator. La. R.S. § 23:1711(G)(1)(d).

Employers must also display a poster containing language as provided by the LWC “in a prominent and accessible location at each of its business premises.” The poster must include the responsibilities of independent contractors to pay taxes as required by federal and state law, protections against retaliation, the penalties for employee misclassification, and contact information for individuals to file complaints regarding employment classification, among other information. La. R.S. § 23:1711(G)(4).

C. Employment of Aliens

Employers may not employ, hire, or refer for employment within Louisiana any alien who is not entitled to lawfully reside or work in the United States. The law creates exceptions for aliens employed in (1) planting and/or harvesting on premises where agricultural, forestry, or horticultural products are produced; (2) production and/or gathering on premises where livestock, dairy, or poultry products are produced; (3) the field of animal husbandry; or (4) the care, feeding, and training of horses. Penalties for employing an alien in violation of state law are subject to a progressive fine up to $2,000 for each alien so employed. Reliance on, inter alia, E-Verify provides a safe harbor from assessment of civil penalties. La. R.S. § 23:991, et seq.

D. Employment of Minors

The Louisiana Child Labor law, La. R.S. § 23:151, et seq., governs the employment of minors, though it does not apply to minors employed in agriculture or domestic service in private homes. La. R.S. § 23:151. Employers may not employ minors under the age of 12, but they may employ minors 12 and 13 years of age only if a parent or guardian owns the business and directly supervises the minor. Generally, employers may employ minors 14 and older in non-hazardous occupations (hazardous occupations are described in the law) if (1) an employment certificate is obtained, and (2) certain hours restrictions are met. La. R.S. § 23:161-162. There are special rules for the entertainment industry (“theatrical performances or exhibitions”). Some of the child labor law provisions are set forth below.
1. Employment Certificate

Employment certificates must be procured and kept on file for each minor employed by the employer. La. R.S. § 23:182. The certificates are issued by (1) the parish or city school superintendent upon the application by the minor to be employed; (2) the written permission of the minor’s parent/guardian; (3) a signed statement by the prospective employer stating the specific nature of the work the minor is to perform, the number and hours for each day and week the minor is to work, and the wages to be paid to the minor; and (4) proof of the minor’s age, such as a birth certificate. La. R.S. §§ 23:183-184.

2. Restriction on Work Hours

Ages 12-13

Minors age 12 and 13 may be employed by their parent/guardian so long as the following criteria are met:

- The parent/guardian owns the business.
- The minor directly reports to and is supervised by the parent/guardian.
- The minor is subject to the protections afforded 14 and 15 year olds.
- An employment certificate is obtained.


Ages 14-15

Minors age 14 and 15 may be employed under the following conditions:

- They may only work after school hours and during non-school days.
- They may not work more than eight hours in any workday or more than six consecutive workdays in one week.
- They may not be employed more than three hours each day on any school day, nor more than 18 hours in any week school is in session.
- Minors who have not graduated from high school may not work between the hours of 7 p.m. and 7 a.m. The impermissible hours are limited to 9 p.m. to 7 a.m. from June 1 through Labor Day.
- Minors who have not graduated from high school may not work more than 40 hours in any one week.

Age 16

- Minors who have not graduated from high school may not be permitted to work between the hours of 11 p.m. and 5 a.m. prior to the start of any school day.


Age 17

- Minors who have not graduated from high school may not be permitted to work between the hours of midnight and 5 a.m. prior to the start of any school day.


3. Meal and Rest Periods

Louisiana’s child labor law prohibits employers from employing minors for more than 5 hours without allowing 1 meal period at least 30 minutes long. Employers must document breaks. If an edit is necessary to a minor’s time card, the minor and the manager who makes the edit must document and acknowledge it. La. R.S. § 23:213.

4. Posting

Any employer of minors must conspicuously post at the place of employment an abstract of Louisiana’s child labor law and a list of occupations prohibited to minors. La. R.S. § 23:217.

5. Penalties

An employer that violates the child labor law may be fined not less than $100 nor more than $500 or will be imprisoned for not less than 30 days nor more than six months, or both. La. R.S. § 23:231.

E. Employment of Registered Sex Offenders, Sexually Violent Predators, and Child Predators

Louisiana law prohibits employers from hiring employees who are required to register as a sex offender, sexually violent predator, or child predator to (1) operate any bus, taxicab, or limousine for hire; (2) serve as a service worker who goes into a residence to provide any type of service; (3) operate a carnival or amusement ride (if the offense involved a minor child); and (4) engage as a door-to-door solicitor, peddler, or itinerant vendor selling any type of goods or services, including magazines or periodicals or subscriptions to magazines or periodicals. La. R.S. § 15:553.
II. DISCRIMINATION AND RETALIATION

A. Employment Discrimination Law

The Louisiana Employment Discrimination Law (LEDL) prohibits employment discrimination based on race, color, religion, sex, national origin, age, disability, pregnancy, sickle cell trait, genetic information, and the status of veterans who attend certain medical appointments. La. R.S. § 23:301, et seq. The LEDL generally applies only to employers who regularly employ 20 or more employees within the state. La. R.S. § 23:302(2). However, the pregnancy discrimination provisions only apply to employers who regularly employ 25 or more employees. La. R.S. § 23:341. The term “employer” for purposes of the LEDL “means a person, association, legal or commercial entity, the state, or any state agency, board, commission, or political subdivision of the state receiving services from an employee and, in return, giving compensation of any kind to an employee.” La. R.S. § 23:302(2). The LEDL does not provide for individual liability of supervisors. Additionally, the LEDL does not apply to employment of an individual by a parent, spouse, or child, to employment in domestic service, or to private educational or religious institutions or nonprofit corporations. La. R.S. § 23:302(2). Information on some of the protected categories is set forth below.

1. Age

The age discrimination provisions of the LEDL protect applicants and employees who are at least 40 years of age. La. R.S. § 23:311. Louisiana law prohibits employers from reducing the wage rate of any employee in order to comply with the provisions prohibiting age discrimination. La. R.S. § 23:312.

It is not unlawful for an employer to take any action otherwise prohibited under the age discrimination provisions of the LEDL consistent with a bona fide seniority system or benefit plan, such as retirement, pension, or insurance plan, so long as said system or plans are not a subterfuge to evade the purposes of the age discrimination provisions. It is also not unlawful to take any employment action otherwise prohibited by the age discrimination provisions where age is a bona fide occupational qualification reasonably necessary for the normal operation of the particular business in question, or where the differentiation is based on reasonable factors other than age. La. R.S. § 23:312.

2. Disability

The LEDL prohibits discrimination against otherwise qualified applicants and employees on the basis of disability when it is unrelated to the person’s ability to perform a particular job with or without a reasonable accommodation. An employer may also not discriminate against an otherwise qualified disabled person on the basis of physical or mental examinations or pre-employment interviews that are not directly related to the requirements of the specific job, or that are not required of all employees or applicants. La. R.S. § 23:323. However, an employer may apply qualification standards, tests, or selection criteria that tend to screen out or otherwise deny a job or benefit to a disabled person where
the standards, tests, and/or criteria are job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation. La. R.S. § 23:324. Reasonable accommodation is defined as an adjustment or modification to a known physical limitation of an otherwise qualified disabled person that would not impose an undue hardship on the employer. The LEDL provides that the term “reasonable accommodation” shall not be construed to impose on any private sector employer . . . any additional costs in the hiring or the promotion of a disabled person.” La. R.S. § 23:322.

3. Pregnancy

The LEDL prohibits discrimination in employment based on pregnancy, childbirth, or related medical conditions, unless the action is based upon a bona fide occupational qualification. La. R.S. § 23:342. Under Louisiana law, pregnancy, childbirth, and related conditions are treated as any other temporary disability. La. R.S. § 23:341(B). An employer must temporarily transfer a pregnant employee to a less strenuous or hazardous position for the duration of her pregnancy if requested with the advice of her physician, where such transfer can be reasonably accommodated, but the employer need not create “additional employment,” bump another “employee with more seniority,” or promote an unqualified employee. La. R.S. § 23:342(4). The statute also addresses the amount of leave to which a female employee is entitled to take based on her pregnancy, childbirth, or related medical conditions. For details of the specific leave requirements, see the leave section below. The above provisions apply only to employers with at least 25 Louisiana employees in each of 20 weeks during the current or preceding calendar year. La. R.S. § 23:341(A).

4. Genetic Information

Louisiana law prohibits discrimination in employment based on an individual’s genetic information. Generally, employers may not “require, collect, or purchase” protected genetic information or disclose such information to outsiders, with certain limited exceptions, such as compliance with a subpoena. Employers may require genetic information from an applicant or employee who has been given a conditional offer of employment if the genetic information is to be used exclusively to assess whether further medical evaluation is needed to diagnose a current disease, medical condition, or disorder that could prevent the person from performing the essential functions of the position he or she holds or desires, and the employer discloses the information only to medical personnel involved in assessing whether further medical evaluation is needed for such a diagnosis. This law also allows genetic monitoring of biological effects of toxic substances in the workplace if the employee provides written authorization. The employer must notify the employee of the results of any monitoring and make the results available. La. R.S. § 23:368.

5. Sex—Equal Pay

The LEDL prohibits private employers from discriminating in compensation based on sex (or other protected categories), and specifically from intentionally paying an employee wages at a rate less than that of employees of the opposite sex for equal work that requires the same skill, effort, and responsibility, and that is performed under similar
working conditions. Employers may not reduce the wages of any employee in order to comply with this law. La. R.S. § 23:332(A)(3). There is an exception for “a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production, or any other differential based on any factor other than sex, or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of” a protected characteristic. La. R.S. § 23:332(H)(3).

Though not part of the LEDL, the Louisiana Equal Pay for Women Act applies to state employers, and prohibits discrimination against an employee on the basis of sex by paying wages to an employee at a rate less than that paid within the same agency to another employee of a different sex for the same or substantially similar work, with respect to jobs that require equal skill, effort, education, and responsibility and are performed under similar working conditions, such as time worked in the position. La. R.S. §§ 23:663, 23:664.

The Equal Pay for Women Act does not prohibit payment of different wages to employees where such payment is based on a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on a bona fide factor other than sex, such as training or education so long as the factor is related to the job position in question and no alternative employment practice would serve the same legitimate business purpose without producing such a differential. La. R.S. § 23:664.

6. Veterans’ Medical Appointments

The LEDL makes it unlawful to discharge, otherwise discipline, threaten to discharge, or threaten to discipline any veteran for taking time away from work to attend medical appointments necessary to meet the requirements to receive his or her veterans benefits. The veteran must verify his or her attendance at the medical appointment upon the employer’s request by presenting a bill, receipt, or excuse from the medical provider. La. R.S. § 23:331. For purposes of this section, “veteran” means any honorably discharged veteran of the U.S. Armed Forces, including reserve components of the armed forces, the Army National Guard, the Air National Guard, the commissioned corps of the Public Health Service, and any other category of persons designated by the president in time of war or emergency. La. R.S. § 23:331.

7. Bona Fide Occupational Qualifications

The LEDL creates an exception and allows employers to hire and employ individuals on the basis of sex, age, religion, or national origin, in those instances where sex, age, religion, or national origin is a bona fide occupational qualification reasonably necessary for the normal operation of the particular business or enterprise in question. La. R.S. §§ 23:332, 23:312.
8. Enforcement

Louisiana has its own equal employment opportunity agency, the Louisiana Commission on Human Rights. Because the state of Louisiana and the U.S. Equal Employment Opportunity Commission have a work-sharing agreement, an employee may file a charge with either agency to satisfy the charge-filing requirements of Title VII of the Civil Rights Act of 1964; the Americans with Disabilities Act of 1990, as amended; and the Age Discrimination in Employment Act of 1967. However, filing a charge of discrimination is not a prerequisite to filing suit under the LEDL. Instead, the employee only needs to provide 30 days written notice of the intent to file suit detailing the alleged discrimination, and both parties must make a good faith effort to resolve the dispute prior to the employee initiating court action. Most courts hold that the filing of a state or federal charge of discrimination satisfies the pre-suit notice requirement. Claims under the LEDL are subject to a one-year statute of limitation, which is tolled while a charge of discrimination is pending, up to a maximum of six months. La. R.S. § 23:303.

B. Discrimination Based on Employee Activity and/or Status

1. Breastfeeding

A mother has the right to breastfeed her baby “in any place of public accommodation, resort, or amusement.” The law makes interference with this right a discriminatory practice, though there is no penalty provided. Thus, it is likely that this law would be enforced by injunction. La. R.S. § 51:2247.1.

2. Conscience in Health Care Protection

No person shall be held civilly or criminally liable, discriminated against, dismissed, demoted, or in any way prejudiced or damaged for declining to participate in any health care service that violates his conscience. For purposes of this statute, “health care service” is limited to abortion, dispensation of abortifacient drugs, human embryonic stem cell research, human embryo cloning, euthanasia, or physician-assisted suicide. An employer may inquire as to whether a person declines to participate in any such health care service that violates his or her conscience. Persons who seek employment at a health care facility must notify the prospective employer of the existence of any sincerely held religious belief or moral conviction they have. An employee must notify his or her employer in writing as soon as practicable of any health care service that violates his or her conscience. Any health care facility that employs a person with a sincerely held religious belief or moral conviction must ensure that the health care facility has sufficient staff to provide patient care in the event an employee declines to participate in any health care service that violates his conscience. This law does not relieve any health care provider from providing emergency care as required by state or federal law. La. R.S. § 40: 1061.20.
3. Garnishment

An employer may not discharge an employee because his or her wages have been subject to a voluntary assignment or a single garnishment. Remedies under this statute are limited to reinstatement and back pay. However, a person who claims failure to hire in violation of this statute has a right to reasonable damages. Also, an employer may discharge an employee if the employee’s earnings are subjected to three or more garnishments for unrelated debts in a two-year period. Garnishment resulting from an accident or illness causing absences of 10 consecutive days or more of work may not be considered for this exception. La. R.S. § 23:731.

4. Injured Workers

The Louisiana Workers’ Compensation Act prohibits an employer from refusing to hire or discharging an employee for asserting a workers’ compensation claim. The remedy for a violation of this law is limited to one year of pay, reasonable attorneys’ fees, and court costs. La. R.S. § 23:1361.

5. Military Personnel

No person who is a member of a reserve component of the Armed Forces of the United States or who is a member of the Louisiana National Guard can be denied employment, retention, or any promotion or other advantage of employment because of any obligation as a member of such reserve component or of the Louisiana National Guard. La. R.S. § 29:38.1.

The Military Services Relief Act states employers may not deny employment, promotion, or any other benefit to a person who has applied for, is performing, or has performed military service. Employers also may not take adverse action against any person because that person endorsed a protection afforded any person under the act, testified or made a statement in connection with a proceeding under the act, or exercised a right under the act. La. R.S. 29:404. The act provides reinstatement rights similar to those provided by the Uniformed Services Employment and Reemployment Rights Act (USERRA), but note that employees on leave must accrue leave, as well as seniority, and receive other benefit rights. La. R.S. § 29:401, et seq.

6. Political Activity

An employer may not forbid or prevent any employee from engaging or participating in politics or from becoming a candidate for public office. This statute applies to employers that regularly employ 20 or more employees. An individual who discriminates against an employee because of his political views or activities is subject to damages, a fine up to $1,000, and imprisonment for up to six months. A firm, corporation, or association is subject to a fine up to $2,000. La. R.S. § 23:961.
7. Sexual Orientation & Gender Identity

Discrimination against either class is not expressly unlawful under the LEDL. Governor John Bell Edwards issued an executive order in April 2016 that extended protections to these two classes for employees in public service and to employers who contract with the state. The First Circuit found this executive order unconstitutional, and the Louisiana Supreme Court denied the Governor’s writ application in 2018. La. DOJ v. Edwards, 239 So.3d 824 (2018). New Orleans has a city ordinance which prohibits discrimination in employment based on an individual’s sexual orientation.

8. Smoking

Employers may not discriminate against an employee because the individual is a smoker or nonsmoker, or to require as a condition of employment that the individual abstain from smoking or otherwise using tobacco products outside the course of employment. The employer can, however, discipline and/or discharge an employee who fails to abide by company policy regarding regulation of smoking (i.e., times and locations). La. R.S. § 23:966.

9. Veterans Hiring Preference

An employer may adopt a policy that gives preference in hiring to the following: (1) an honorably discharged veteran; (2) the spouse of a veteran with a service-connected disability; (3) the unmarried widow or widower of a veteran who died of a service-connected disability; (4) the unmarried widow or widower of a member of the U.S. Armed Forces who died in the line of duty under combat-related conditions. La. R.S. § 23:1001. A policy that adopts these preferences is not considered a violation of any state or local equal employment opportunity law.

C. Retaliation

1. Employment Discrimination Law

Louisiana Revised Statute § 51:2256 makes it unlawful for an employer to conspire to retaliate or discriminate in any manner against a person because he or she has opposed a practice declared unlawful by the LEDL, La. R.S. § 23:301, et seq., or because he or she has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under the LEDL.

The LEDL specifically prohibits retaliation against an employee or applicant for employment who has opposed any practice made unlawful by the age discrimination or sickle cell trait provisions, or because the individual has made a charge, testified, assisted, or participated in an investigation, proceeding, or litigation relating to age or sickle cell trait discrimination. La. R.S. §§ 23:312, 23:352.
2. Anti-Reprisal Statute

Louisiana’s anti-reprisal statute prohibits reprisal against an employee who in good faith, and after advising the employer of the violation of law (1) discloses or threatens to disclose a workplace act or practice that is in violation of state law; (2) provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of state law; or (3) objects to or refuses to participate in an employment act or practice that is in violation of state law. La. R.S. § 23:967. The anti-reprisal statute requires an employee to establish an actual violation of state law, as opposed to a reasonable belief that such a violation occurred. If the court finds either that the plaintiff’s suit under the anti-reprisal statute was brought in bad faith or that the employer’s act or practice complained of was not in violation of the law, the employer may be entitled to recover its reasonable attorneys’ fees and court costs from the employee. La. R.S. § 23:967(D).

Public employees additionally are protected by La. R.S. § 42:1169.

3. Environmental Whistleblower Statute

The Louisiana Environmental Whistleblower Statute prohibits retaliation against an employee who, acting in good faith (1) discloses, or threatens to disclose, to a supervisor or to a public body an activity, policy, practice of the employer or another employer with whom there is a business relationship that the employee reasonably believes is in violation of an environmental law, rule, or regulation; or (2) provides information to, or testifies before any public body conducting an investigation, hearing, or inquiry into any environmental violation by the employer, or another employer with whom there is a business relationship, of an environmental law, rule, or regulation. Violations of this statute entitle an employee to recover triple damages. La. R.S. § 30:2027.

4. Military Services Relief Act

The Military Services Relief Act prohibits employers from taking adverse action against any person because that person endorsed a protection afforded any person under the act, testified or made a statement in connection with a proceeding under the act, or exercised a right under the act. La. R.S. 29:404.

5. Testifying at Labor Investigation

Employers may not discriminate against an employee because that employee testified in any investigation relative to the enforcement of any of the state’s labor laws. The penalties for violating this provision include civil fines of up to $500, imprisonment up to 90 days, or both. Reasonable litigation expenses, not to exceed $7,500, may be awarded to the prevailing party. La. R.S. § 23:964.
6. Reports of Child Abuse

Louisiana law protects employees from reprisal, including discharge, demotion, suspension, threats, harassment, or discrimination in any manner, for reporting to law enforcement any fellow employee’s sexual abuse of a minor. The law provides a cause of action against employers “for damages associated with any action taken by the employee which is in furtherance of the protection of a minor child,” as provided in the law. The statute entitles employees who prevail on such claims to treble damages, court costs, and attorneys’ fees. It does, however, specify that plaintiffs may not recover under the statute “if the court finds that the plaintiff instituted or proceeded with an action that was frivolous, vexatious, or harassing.” La. R.S. § 23:968.

III. EMPLOYER RIGHTS AND OBLIGATIONS

A. Background Checks

An employer may obtain criminal conviction records of an applicant seeking employment, directly from the Bureau of Criminal Identification and Information in order to further qualify the applicant for the position being sought, if the applicant has signed a consent form authorizing the employer to obtain such conviction records. The applicant must execute a consent form prepared by the bureau. Records obtained will not include those records that have been expunged. La. R.S. § 15:587(F)(1).

An employer that by any lawful means conducts a background check of an employee or prospective employee after having obtained written consent from the employee or prospective employee is immune from civil liability for any claims arising out of the background information obtained. For purposes of this law, “background check” includes research into criminal history, Social Security status or verification, research conducted pursuant to the USA PATRIOT Act, as well as any permissible purpose under the Fair Credit Reporting Act. La. R.S. 23:291(D).

There is no negligent hire or negligent supervision cause of action against an employer/principal for damages by a worker solely because he or she previously was criminally convicted; however, this immunity does not apply to (a) damages caused by the worker’s acts, arising out of the course and scope of employment, substantially related to the nature of the crime for which the employee was convicted and the employer/principal knew or should have known of the conviction; or (b) acts of an employee previously convicted of certain enumerated violent or sex offense crimes if the employer/principal knew or should have known of the conviction. La. R.S. 23:291(E).

B. Cellular Tracking Devices Prohibited

Louisiana law prohibits any person from possessing or using a cellular tracking device for the purpose of collecting, intercepting, accessing, transferring, or forwarding data transmitted or received by the communications device, or stored on the communications device of another, without the consent of a party to the communication by intentionally deceptive means. La. R.S. § 14:222.3(A). Employers may use cellular tracking devices if the employer is “acting in good faith
on behalf of a business entity for a legitimate business purpose” or the employer is the owner of a vehicle and consents to the use of the tracking device with respect to the vehicle. La. R.S. § 14:222.3(C)(4), (13). Violations of this law shall result in fines not exceeding $3,000, imprisonment for not more than 2 years, or both. La. R.S. § 13:222.3(D).

C. Disclosure of Employee Information

An employer who, at the request of a prospective employer or a current or former employee, provides accurate information about the employee’s job performance or reason for separation is immune from civil liability and other consequences of disclosure unless it can be shown that the information disclosed was knowingly false and deliberately misleading. A prospective employer who reasonably relies on such information is immune from civil liability for any action related to hiring the employee. La. R.S. § 23:291.

D. Drug Testing

Louisiana’s drug testing statute provides procedures (SAMHSA guidelines) that employers must follow when subjecting applicants or employees to drug tests. It applies only to testing for the presence of marijuana, opioids, cocaine, amphetamines, and phencyclidine; it does not preclude or regulate testing for other controlled substances or alcohol. Exceptions to the statute include certain athletes and any person, firm, or corporation engaged or employed in the exploration, drilling, or production of oil or gas in Louisiana or its territorial waters. The law also does not apply to any employer or an employer’s agent who uses an on-site screening test to test an employee or prospective employee when there are no negative employment consequences. La. R.S. § 49:1002.

All testing for marijuana, opioids, cocaine, amphetamines, or phencyclidine shall be performed in a laboratory that is certified by the Substance Abuse and Mental Health Services Administration (SAMHSA) or College of American Pathologists/Forensic Urine Drug Testing (CAP-FUDT) if the results of the test will subject an employee to negative employment consequences. La. R.S. § 49:1005(A). Except as provided in the workers’ compensation and unemployment benefits settings, all covered employee drug testing must comply with the SAMHSA guidelines; as such, the employer must confirm positive test results. The cutoff limits for drug testing must be in accordance with SAMHSA guidelines, with the exception of initial testing for marijuana. The initial cutoff level for marijuana must be no less than 50 nanograms/ML and no more than 100 nanograms/ML as specified by the employer or the testing entity. La. R.S. § 49:1005(B). However, the initial cutoff level for marijuana testing may be reduced or modified by any person, firm, or corporation engaged in construction, maintenance, or manufacturing at any refining or chemical manufacturing facility. La. R.S. § 49:1002.

Any employee, confirmed positive, upon his or her written request, must have the right of access within seven working days to records relating to his or her drug tests and any records relating to the results of any relevant certification, review, or suspension/revocation-of-certification proceedings. The employer may, but does not have to, afford an employee, whose drug test is certified positive by the medical review officer, the opportunity to undergo rehabilitation without termination of employment. La. R.S. § 49:1011.
Information regarding drug test results that an employer receives through its drug testing program may only be disclosed to the employer or testing entity, an authorized employee or agent of the employer or testing entity, and the tested individual. The employer may not otherwise disclose any information regarding test results it receives through its drug testing program and such information may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceeding except in connection with an administrative or disciplinary proceeding or hearing, or civil litigation where drug use by the tested individual is relevant. The unauthorized disclosure of drug testing results may subject an employer to a claim of defamation or invasion of privacy. La. R.S. § 49:1012.

E. Federal Earned Income Tax Credit

Employers are required to notify new employees whose anticipated annual wages total $35,000 or less that they may be eligible for the Earned Income Tax Credit or the Advance Earned Income Credit and may apply for the credit on their tax returns or receive the credit in advance payments during the year. Employers are required to post this in the same location where other employee notices required by state or federal law are posted. La. R.S. § 23:1018.2.

F. Firearms at Work

Louisiana state law provides that firearms may be brought on the employer’s premises if they are locked in a privately-owned motor vehicle. The employer may place certain restrictions on the possession or transport of a firearm on its premises. For example, the law does not prohibit an employer from adopting policies specifying that firearms stored in locked, privately owned motor vehicles on property controlled by the employer be hidden from plain view or within a locked case within the vehicle. However, whether those restrictions are appropriate must be determined based on the individual circumstances of the employer. Exceptions include situations in which firearms are prohibited by state or federal law; employer vehicles are used in the course of employment, except where firearms are required for that employment; and where certain alternative restricted-access parking areas are provided, including facilities for the temporary storage of unloaded firearms. La. R.S. § 32:292.1.

G. Health Insurance

Employers are not required to provide health insurance coverage for their employees, but if they do, state law requires and/or otherwise governs the following categories of coverage, La. R.S. §§ 22:1000, et seq.:

- Cervical cancer screenings (annual Pap test)
- Colorectal cancer screenings
- Dental care provided in a hospital setting
- Dependent care coverage for unmarried children 26 years of age or younger, including coverage for adopted children, ambulance services, disabilities, cleft palate, immunizations, attention deficit/hyperactivity disorder, hearing aids, autism spectrum disorders, catastrophic illnesses
- Diabetes
- Emergency care
- Flexible health policies, contracts, and agreements
- Genetic information/testing
- Infertility
- Interpreters
- Mammograms
- Maternity benefits
- Medical foods
- Mental health coverage
- Occupational therapy
- Osteoporosis
- Outpatient services
- Physical Therapy
- Prostate cancer screenings
- Prosthetic devices/services
- Providers—psychologists, podiatrists, optometrists, chiropractors
- Recovered alcoholics
- Rehabilitation services
- Speech and language pathology
- Substance abuse coverage
- Treatment provided in accordance with a clinical trial for cancer

**H. Health Insurance—Continuation Coverage**

Employers maintaining group health policies must provide continuation coverage to employees, members, and covered dependents who have been continuously insured during the three months prior to the termination of employment or membership. Qualifying events that trigger continuation coverage include termination due to termination of active employment or due to death or divorce of the employee or member. Persons not eligible for continuation coverage include individuals who, within 31 days of the qualifying event, are or could be covered by any other group health plan, those whose insurance was terminated due to fraud or failure to pay a premium, or those who are eligible under the federal Consolidated Omnibus Budget Reconciliation Act (COBRA) law. Continuation coverage generally lasts for 12 months following the qualifying event. La. R.S. § 22:1046.

**I. Indemnity**

An employer may be held liable for damages caused by an employee in the exercise of the functions in which the employee is employed. Any remission, transaction, compromise, or other conventional discharge in favor of an employee, or any judgment rendered against an employee for such damages, will be valid as between the damaged creditor and employee; the employer will not have a right of contribution, division, or indemnification from its employee, nor will the employer be allowed to bring any incidental action against such employee. La. R.S. § 9:3921.
J. Internet and Electronic Device Privacy

Employers are prohibited from requesting that an employee or applicant disclose any username, password, or other authentication information to allow access to the individual’s personal online account, and may not retaliate against an employee or applicant who refuses to disclose any such authentication information. La. R.S. § 51:1953(A). A “personal online account” means any online account that the individual uses exclusively for personal communications unrelated to any business purpose of the employer. La. R.S. § 51:1952(3). The law does not prohibit or restrict an employee or applicant from volunteering any username or password to allow the employer access to their personal online account. La. R.S. § 51:1953(G).

An employer may request or require that an employee or applicant disclose any username and password to allow the employer to gain access to or operate an electronic communications device (including computers, telephones, personal digital assistant, and similar devices) paid for or supplied in whole or in part by the employer and/or an account or service provided by the employer or used for the employer’s business purposes. La. R.S. § 51:1953(B)(1). An employer may also limit an employee’s access to certain websites while using electronic communications devices paid for or supplied by the employer, or while using the employer’s network or resources. La. R.S. § 51:1953(B)(5). The law also permits an employer to discipline or discharge an employee who transfers the employer’s proprietary or confidential information or financial data to an employee’s personal online account without authorization. La. R.S. § 51:1953(B)(2).

Additionally, an employer may ask for, and require, the employee to provide certain content from a personal online account relevant to an investigation being conducted by the employer, but the employer may not require an employee to provide the employer with access to the account for purposes of conducting an investigation (absent payment as described above). La. R.S. § 51:1953(B)(3)-(4). Finally, the law does not restrict an employer from complying with a duty to screen applicants prior to hiring or to monitor or retain employee communications as required by state or federal law, or rules of self-regulatory organizations. La. R.S. § 51:1953(D).

K. Loans to Employees

An employer can lend money to employees, but never at an annual interest rate greater than 8 percent. Penalties for violation this provision include a fine of between $25 and $100, imprisonment for up to three months, or both. La. R.S. 23:691.

L. Nooses Prohibited

In addition to the prohibition against race discrimination in employment, Louisiana law makes it a crime for any person, with the intent to intimidate any person or group of persons, to etch, paint, draw, or otherwise place or display a hangman’s noose on the property of another or in a public place. La. R.S. § 14:40.5(A).

M. Polygraph Tests

Louisiana does not have a law governing the use of polygraphs in employment.
N. Plant Closings

Louisiana does not have a law governing plant closings.

O. Purchase of Merchandise

An employer may not coerce or require any of its employees to deal with or purchase any article of food, clothing, or merchandise of any kind from any person. Similarly, an employer may not exclude from work, punish, or blacklist employees for failing to deal with another or to purchase any article of food, clothing, or merchandise from another. The sale and purchase of uniforms are exempt from this law. La. R.S. § 23:963. Violators will be subjected to fines not less than 50 dollars nor more than 100 dollars, or imprisoned for not less than 30 days nor more than 90 days, or both. La. R.S. § 23:963.

P. Smoke-Free Air Act

The Louisiana Smoke-Free Air Act requires employers to ban smoking within, remove all ashtrays from, and conspicuously place no-smoking signs in any enclosed workplace. Smoking is permitted outdoors, but employers may ban smoking outdoors on their premises by posting no-smoking signs to that effect. The Act does not apply to places of employment in particular industries, including bars, gaming establishments, and tobacco retailers. Additionally, the Act prohibits discrimination and retaliation against individuals for complaining about violations of the Act. Violations of this Act may result in a series of fines ranging from $100 to $500. La. R.S. § 40.1300.253, et seq.

Q. Unemployment

The Louisiana Employment Security Law covers employers who paid $1,500 in wages during any quarter in the current or preceding year or employed at least one person, full time or part time, during 20 calendar weeks in the current or preceding year. To qualify for benefits, a claimant must not be unemployed due to “misconduct” and the claimant must be able to work, available to work, conducting an active search for work, and unemployed for a waiting period of one week. La. R.S. § 23:1471, et seq. Employees who are terminated for the use of illegal drugs are disqualified from receiving unemployment compensation benefits. La. R.S. § 23:1601(10). The findings of facts and/or law in any judgment, opinion, conclusion, or final order made by an unemployment compensation hearing officer or administrative law judge do not have any precedential value. La. R.S. § 23:1636.

Employees may not waive or release their right to unemployment benefits, nor may employees be required, either directly or indirectly, to pay the employer’s contribution required by the Louisiana Employment Security Law. La. R.S. § 23:1691. Employers are prohibited from discriminating against any individual based on his or her claim for unemployment benefits. Violators may be fined not less than $100 nor more than $1,000, or imprisoned for not less than 1 month nor more than 6 months, or both. La. R.S. § 23:1691.
R. Louisiana Consumer Credit Law

Employers that deny employment due to information provided by a credit reporting agency must provide the name of the credit reporting agency that provided such information if requested by the applicant. La. R.S. § 9:3518.1

S. New-Hire Reporting

Employers must report all new hires and rehires within 20 days of hire. The new-hire report must contain, at minimum, the name, address, occupation, and Social Security number of the employee, as well as the name, address, and Federal Employer Identification Number of the employer. La. R.S. § 46:236.1.4.

T. New-Hire Notice

Employers must advise new hires of the following requirement (not applicable to active members of the armed forces) and post an equivalent notice:

Any person who is a resident of a state which requires registration of the motor vehicle or motor vehicles of a person who is employed in that state within thirty days of such employment, and who is employed in and maintains a residence in Louisiana and who operates one or more vehicles on the public streets and roads in Louisiana shall apply for a certificate of registration for each of those vehicles within thirty days of the date on which the person was employed in Louisiana. La. R.S. 47:501.1.

U. Restrictive Covenants

Louisiana prohibits agreements that prevent one from “exercising a lawful profession, trade, or business,” except as specifically authorized by La. R.S. 23:921(A)(1). The statute provides exceptions for employees, independent contractors, computer programmer employees, corporations, partnerships, limited liability companies, and franchises in specified situations; car salesmen, however, cannot be restrained from selling vehicles. La. R.S. § 23:921. Under the noncompetition statute, an employee may agree with his or her “employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes...so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment.” La. R.S. 23:921(C). The statute is strictly construed. See, e.g., J4H, L.L.C. v. Derouen, 2010-0319 (La. App. 1 Cir. 9/10/10), 49 So. 3d 10, 14. Note that the leading Louisiana Supreme Court case on the statute, SWAT 24 Shreveport Bossier, Inc. v. Bond, 00–1695 (La. 6/29/01), 808 So. 2d 294, was legislatively overruled at La. R.S. 23:921(D) to the extent the court held that only owning a competing business could be prohibited by agreement under the statute. See Restored Surfaces, Inc. v. Sanchez, 11-529, p. 6 (La. App. 5 Cir. 12/28/11), 82 So. 3d 524, 528. The great weight of authority is that to be valid, an agreement must identify a restricted geographic area by reference to named parishes or municipalities; other references, such as to miles from an office, do not satisfy the statute and are not enforceable. See, e.g., SWAT 24, 808 So. 2d at 308-09, citing AMCOM of Louisiana, Inc. v. Battson, 28,171 (La. App. 2 Cir. 1/5/96), 666 So. 2d 1227, as reversed by 96-
0319 (La. 3/29/96), 670 So. 2d 1223; see also, e.g., L & B Transport, LLC v. Beech, 568 F. Supp.2d 689, 693 (M.D. La. 2008). There is a special statute applicable to real estate agents that states that noncompete agreements are unenforceable and an absolute nullity unless the agent is afforded the right to rescind the noncompete agreement until midnight of the third business day following the execution of the noncompete agreement or its delivery to the agent, whichever is later. La. R.S. § 37:1448.1.

V. Uniform Trade Secrets Act

Louisiana’s Uniform Trade Secrets Act (UTSA) is codified at La. R.S. § 51:1431, et seq. The UTSA prohibits the misappropriation of an employer’s trade secrets. For purposes of the UTSA, “misappropriation” is defined as the acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means. “Trade secret” is information that derives economic value from not being generally known, is not readily ascertainable, and is subject to reasonable efforts to maintain its secrecy. Such information may include a formula, pattern, compilation, program, device, method, technique, or process.

A person guilty of misappropriating a trade secreted may be enjoined from using the trade secret and is liable for damages. See, e.g., Stork-Werkspoor Diesel V.V. v. Koek, 534 So. 2d 983 (La. App. 5 Cir. 1988) (a person or a business can obtain injunctive relief from the Louisiana courts for either “[a]ctual or threatened misappropriation” of their trade secrets or damages for actual losses and unjust enrichment). In order to recover damages under the UTSA, a complainant must prove the existence of a trade secret, the misappropriation of the trade secret by another, and actual loss caused by the misappropriation.

W. Unfair Trade Practices Law

The Unfair Trade Practices and Consumer Protection Law is codified at La. R.S. § 51:1401, et seq., and makes unfair methods of competition and unfair or deceptive acts in the conduct of a trade or business unlawful. What constitutes unfair competition is determined on a case-by-case basis. A critical factor in this determination is the defendant’s motivation to harm competition. Thus, the state law requires a plaintiff to prove some element of fraud, misrepresentation, deception, or other unethical conduct. Employers have relied on this law in seeking to prevent former employees from using confidential information gained in the course of employment to compete with their former employers. See, e.g., Novelaire Technologies, L.L.C. v. Harrison, 994 So. 2d 57 (La. App. 5 Cir. 2008). The law also has been interpreted to establish a cause of action against employers enforcing an invalid covenant not to compete. See, e.g., Landrum v. Board of Com’rs of the Orleans Levee Dist., 685 So. 2d 382, 389 n. 5 (La. App. 4th Cir. 1996) and cases cited therein.

Under the Unfair Trade Practices and Consumer Protection Law, a successful plaintiff may recover its actual damages incurred as a result of the unfair trade practice. If the court finds that the unfair or deceptive practice was knowingly used after being put on notice by the Louisiana Attorney General, the court will award three times the actual damages sustained. La. R.S. § 51:1409. The law also permits an employer to discipline or discharge an employee who transfers
the employer’s proprietary or confidential information or financial data to an employee’s personal online account without authorization. La. R.S. § 51:1953(B)(2).

IV. WAGE & HOUR LAWS

A. Holidays

The following are legal holidays observed by the State of Louisiana and its departments: New Year's Day, Dr. Martin Luther King, Jr.'s Birthday, Mardi Gras Day, Good Friday, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, and Inauguration Day in the city of Baton Rouge every four years, or the first Tuesday after the first Monday in November in even-numbered years. La. R.S. § 1:55.

B. Maximum Work Hours

Louisiana law sets maximum work hours for minors and street railroad workers. (See Section I.D.2, above, for the work-hour restrictions for minors.) Employees of a street railroad (streetcars) may not work more than 10 hours in a 24-hour period. The 10 hours must be within a consecutive 12-hour period. La. R.S. § 45:716.

1. Drivers of Gas and/or Electric Utility Service Vehicles

Hours of service regulations promulgated by the U.S. Department of Transportation do not apply to drivers of gas and/or electric utility service vehicles in the event the governor of Louisiana declares a state of emergency.

2. Motor Carriers

Louisiana law governs the maximum work hours and required off-duty hours of drivers of motor carriers, including drivers of for-hire carriers of passengers and contract carriers. For-hire carriers and contract carriers must keep driver time records for six months, indicating for all drivers the times they report to duty and are relieved from duty, hours driven, hours on duty, and hours off duty. These records must be made available to the Louisiana Department of Public Safety and Corrections, office of state police, for inspection. La. R.S. §§ 32:1523, 32:1524.

C. Meal & Rest Periods

Louisiana law does not address meal and rest periods except for minors, who must be allowed one meal period of 30 minutes for every 5 hours of work. La. R.S. § 23:213. Also, note that although Louisiana law does not expressly grant nursing mothers a rest period, state law does provide to mothers the right to nurse the mother's infant in any place of public accommodation, resort, or amusement, and it is a discriminatory practice in connection with public accommodation to interfere with this right. La. R.S. § 51:2247.1.
D. Minimum Wage

Louisiana does not have a law governing the minimum wage. The state prohibits local governments from establishing a minimum wage and mandatory, minimum amount of vacation or sick leave days (paid or unpaid) that private employers would be required to pay or grant to their employees. La. R.S. § 23:642.

E. Overtime Wages

Louisiana does not have a law governing overtime pay.

F. Payment to Employees

1. Paydays

Employers employing more than 10 employees who are engaged in manufacturing, boring for oil, or in mining operations, and public service commissions must pay their employees no less than twice during each calendar month and at least two weeks apart, or as near as practicable. Such payment must include all amounts due for labor or services the employee performed during the pay period and must be payable no later than the payday for the following pay period. La. R.S. § 23:633. All other employers who fail to designate paydays must pay employees on the 1st and 16th days of the month, or as near as is practicable to those days. La. R.S. § 23:633. The payday provisions do not apply to any employee considered exempt under the Fair Labor Standards Act (FLSA). La. R.S. § 23:633. Employers must post notice of the payday provisions in the place where they post other employee notices required by state and federal law. La. R.S. § 23:633. An employer’s failure to pay employees in accordance with the payday provisions may result in the assessment of fines of not less than $25 nor more than $250 for each day's violation. A second such violation may, in addition to said fines, subject a person to imprisonment of not less than 10 days. La. R.S. § 23:633.

2. Final Paycheck Law

Except where there is a collective bargaining agreement governing the employment relationship, upon an employee’s separation from employment, the employer must pay the amount then due under the terms of employment, whether the employment is by the hour, day, week, or month. In the case of a discharge, this payment must be made upon the earlier of 15 days after the date of discharge or on the next payday following the date of discharge. In the case of a resignation, this payment must be made upon the earlier of 15 days after resignation, or on the payday for the pay period during which the employee resigned. La. R.S. § 23:631(A). Such final payment must be made at the place and in the manner that was customary during the employment. However, the final payment may be made via United States mail, provided postage has been prepaid and the envelope properly addressed with the employee’s current address as shown in the employer’s records. In the event
payment is made by mail, the employer will be deemed to have made such payment when it is mailed. La. R.S. § 23:631(A).

Vacation pay is considered “an amount then due” only if, in accordance with the employer’s stated vacation policy, (1) the employee is deemed eligible for and has accrued the right to take vacation time with pay, and (2) the employee has not taken or been compensated for the vacation time as of the date of the separation from employment. La. R.S. § 23:631(D).

In the event of a dispute as to the amount of final wages due to an employer following separation, the employer must pay the undisputed portion of the amount due, if any. The employee will have the right to file an action to enforce a claim for final pay allegedly due. La. R.S. § 23:631(B). A violation of the final paycheck provisions will entitle the employee to penalty wages, which will be the lesser of 90 days’ wages at the employee’s daily rate of pay, or full wages from the time the employee’s demand for payment is made until the employer pays or tenders the amount of unpaid wages due to such employee. La. R.S. § 23:632. However, if the court determines that the employer’s dispute of the amount due was in good faith, but nevertheless finds the employer liable for the wages, then the employer must only pay the disputed amount of wages. If the court finds that the employer’s failure to pay the disputed wages is not in good faith, then the employer will be liable for the penalty wages described above. La. R.S. § 23:632. In the event a well-founded suit for unpaid wages is filed at least three days after the employee’s initial demand for payment following discharge or resignation, the employee shall be entitled to reasonable attorneys’ fees.

3. Final Pay to Deceased Employees

An employer may pay to the surviving spouse of a deceased employee any wages and/or benefits due to the deceased employee, if neither spouse instituted divorce proceedings. La. R.S. § 9:1515. In the absence of a surviving spouse, or if either spouse instituted divorce proceedings, the employer may pay the final wages and/or benefits due to any major child of the deceased employee. La. R.S. § 9:1515. Prior to making any such payment, the employer must require the person receiving the payment to execute an instrument before two witnesses giving (1) the name, address, date, and place of death of the deceased employee; (2) the relationship of the person requesting payment to said employee; (3) the name and address of the surviving spouse, or children, if any, of said deceased employee; and (4) such other information as the employer may require. La. R.S. § 9:1515. The employer may make such payments without any court proceedings, order, or judgment authorizing same, and without determining whether or not any inheritance taxes may be due, only if the employer forwards an affidavit stating the name of the deceased, the amount paid, the name of the recipient, and a copy of the release document substantiating the release to the secretary of the Louisiana Department of Revenue, within 10 days of the release of the funds. La. R.S. § 9:1515.
4. Wage Forfeiture

An employer may not require any employee to sign a contract by which the employee must forfeit his wages if discharged before the contract is completed or if the employee resigns employment before the contract is completed. La. R.S. § 23:634. Courts have interpreted this statute as restricting contracts in a variety of situations, including related to the payment of bonuses and commissions, and it applies to employment policies as well as signed agreements. See, e.g., Beard v. Summit Institute of Pulmonary Medicine and Rehabilitation, Inc., 707 So. 2d 1233, 1236 (La. 1998). Whether and how this statute may apply requires a fact-intensive analysis.

5. Wage Deductions

Generally, an employer may not make any deduction from an employee’s earnings. An exception may exist where the deduction is specifically and voluntarily authorized by the employee in writing. Such permissible deductions are authorized by case law and require careful attention so as to not run afoul of the final paycheck or wage forfeiture laws discussed above.

An employer may not require any employee or applicant to pay, or otherwise withhold from the employee’s pay, the cost of fingerprinting, a medical examination, a drug test, or the cost of furnishing any records required as a condition of employment. Violators may be fined not more than $100, or imprisoned for not more than 90 days, or both. La. R.S. § 23:897. However, an employer will have a right of reimbursement from an employee or applicant who is hired as an employee for wages that are at least $1 above the minimum wage, where the employee has agreed in writing to pay the costs of such employee's or applicant's pre-employment medical examination or drug test if the employee terminates the employment relationship less than 90 working days after his or her first day of work or never reports to work, unless such termination is attributable to a substantial change made to the employment by the employer. There can be no such withholding or reimbursement imposed upon part-time or seasonal employees. La. R.S. § 23:897(K); La. R.S. 23:634(B).

6. Fines and Deposits

An employer may not assess any fines against an employee, or deduct any sum as fines from an employee’s earnings, except where the employee willfully or negligently damages the goods or works, willfully or negligently damages or breaks the property of the employer, or where the employee is convicted of or has plead guilty to the crime of theft of employer funds. Any such fines may not exceed the actual damage done. La. R.S. § 23:635.

It is not a fine for an employer to require an employee to give a deposit to insure the return of equipment. Requiring an employee to make a deposit may violate the FLSA if the deduction reduces wages below minimum wage for the week in which the deduction is made. La. R.S. § 23:891.
7. Penalties

Any employer who makes unauthorized deductions from an employee’s wages, either as an unlawful forfeiture of wages or an unlawful fine against the employee, will be fined not less than $25 nor more than $100, or imprisoned for not less than 30 days nor more than 3 months. La. R.S. § 23:636.

V. LABOR LAWS

A. Labor Organizations

The term “labor organization” includes any organization or employee representation committee that exists for the purpose (in whole or in part) of dealing with employers concerning wages, rates of pay, hours of work, or other conditions of employment. La. R.S. § 23:982. Louisiana law protects an employee’s right to “freely and without fear of penalty or reprisal” form, join, and assist labor organizations or to refrain from any such activities. La. R.S. § 23:981. No person can be required, as a condition of employment, to become or remain a member of any labor organization, or to pay any dues, fees assessments, or other charges of any kind to a labor association. La. R.S. § 23:983.

Any employment agreement containing an express or implied promise to join or refrain from joining a labor organization, or an express or implied promise to withdraw from employment in the event of membership in a labor organization, is contrary to public policy and unenforceable. La. R.S. § 23:823. Any employer who coerces, requires, demands, or influences any person to enter into such an agreement will be subject to a fine of not less than $50 or imprisonment for not less than 30 days. La. R.S. § 23:824.

VI. LEAVE LAWS

A. Paid Bone Marrow Donor Leave

Employees who work an average of 20 or more hours per week are entitled to paid leaves of absence in order to undergo a medical procedure to donate bone marrow. La. R.S. § 40:1263.4. This statutory right is applicable only to persons employed by employers who employ at least 20 or more employees at one site. La. R.S. § 40:1263.4(A). The combined length of the leave may not exceed 40 hours, unless agreed to by the employer. La. R.S. § 40:1263.4(B). The employee who undergoes such a procedure pursuant to this statute is also protected from retaliation for requesting or obtaining such a leave of absence. La. R.S. § 40:1263.4(D).

B. Maternity Leave

The maternity leave provisions appear in the LEDL with the prohibition against pregnancy discrimination applicable to employers of over 25 Louisiana employees, as described above. Six weeks unpaid medical leave is authorized for a normal pregnancy, birth, and related medical condition. La. R.S. § 23:341(B)(1). Where a female employee is rendered “disabled” on account of pregnancy, childbirth, or other related medical condition, she is entitled to take leave for a
“reasonable time,” not to exceed four months. La. R.S. § 23:342(2)(b). Covered employers must “temporarily transfer a pregnant female employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, where such transfer can be reasonably accommodated.” There is no obligation to create a new job or bump other employees. La. R.S. § 23:342(4).

C. Parental School Leave

An employer may grant an employee leave from work for up to a total of 16 hours during any 12-month period to attend, observe, or participate in conference or classroom activities related to the employee’s dependent children, for whom he or she is the legal guardian, that are conducted at the child’s school or day care center if the conference or classroom activities cannot reasonably be scheduled during the non-work hours of the employee. This can be unpaid leave, but the employee must be allowed to substitute any accrued vacation or other paid leave time if he or she so desires. La. R.S. § 23:10152. This leave is not mandated by the statute.

D. Jury Duty Leave

Employees are entitled to one day of paid jury duty per jury duty summons, and thus the first day of any jury duty must be granted to an employee as a paid leave of absence. After the first day, the leave does not have to be paid. As long as the employee gave prior notice within a reasonable time prior to his appearance for jury duty, the employer cannot discharge or otherwise take any adverse action, without cause, against any employee who is called to serve or who is presently serving any jury duty. La. R.S. § 23:965.

E. Military Leave

1. Military Leave Requirements

Provided he or she gives proper notice in writing of the intent to return to the same position of employment, an employee who leaves employment in order to perform services in the uniformed services must be treated as being on military leave. At his or her discretion, the employee may use any combination of accrued annual leave, paid military leave, vacation leave, or compensatory leave to which he or she is entitled during the period of uniformed service. While performing uniformed service, the employee is still entitled to accrue any sick leave, vacation leave, military leave, holiday leave, and any paid leave offered by the employer pursuant to the employer’s stated leave of absence policy to the extent the employee would have been entitled to such leave had he or she been continuously employed. La. R.S. § 29:406. Additionally, such employees have the right to participate in insurance provided through the employer and are entitled to up to four years of creditable service vesting in a retirement system, pension fund, or employee benefit plan. La. R.S. 29:407; 29:411.

An employee absent from employment because of military service is entitled to reinstatement rights and benefits within 10 days of applying for reinstatement provided that the employee gave advance notice of such service, notifies the employer of his or her intent
to return, and has not been absent for more than five years. An employee restored to employment under this law may not be discharged without cause for one year. An employer may not be required to re-employ a person under this law if circumstances have changed, making such employment impossible or unreasonable; employment would impose an undue hardship; or there was an expectation that the employee’s position was temporary. La. R.S. § 29:410. An employee who successfully brings suit under the Military Service Relief Act may be entitled to lost wages or benefits, attorneys’ fees, and payment of an amount equal to the lost wages or benefits as liquidated damages.

Further, an employee called to active duty in the service of the national guard of any state must, upon release and return under honorable conditions, be reinstated or restored to the same or comparable position of employment, except in cases where the employee held a temporary position at the time of being called to duty. La. R.S. § 29:38.

2. Protection for Military Personnel

An employer may not deny employment, retention in employment, or any promotion or other advantage of employment to a person who is a member of a reserve component of the Armed Forces of the United States or who is a member of the Louisiana National Guard because of any obligation as a member of such reserve component or the Louisiana National Guard. La. R.S. § 29:38.1.

F. Leave for First Responders

Louisiana protects the employment of first responders. The term “first responders” includes, but is not limited to, the following: medical personnel, emergency and medical technicians, volunteer firemen, auxiliary law enforcement officers, members of the Civil Air Patrol and volunteers in activities of the Governor's Office of Homeland Security & Emergency Preparedness. La. R.S. § 23:1017.1(6). An employee who leaves employment in order to perform the duties of a first responder must be treated as being on temporary leave of absence subject to the terms and conditions of the employer's stated policy regarding leaves of absence, provided the first responder reports to his or her place of employment within 72 hours after his or her release from duty or recovery from disease or injury resulting from the activities. Such leaves of absence cannot not be considered a break in employment for purposes of seniority or length of service or for benefits programs offered by that employer. La. R.S. §§ 23:1017.2 – 23:1017.4.

G. Leave for Veterans to Obtain Benefits

The LEDL requires employers to allow a veteran to take time away from work to attend medical appointments necessary to meet the requirements to receive veterans’ benefits, and prohibits associated discrimination or retaliation. The veteran shall verify his or her attendance of the medical appointment, if requested by his or her employer, by presenting a bill, receipt, or excuse from the medical provider. La. R.S. 23:331.
A. Coverage

All employers, both private and public, are required to maintain workers’ compensation coverage for their employees. Volunteer firefighters and members of the National Guard who are accidentally injured while on active duty are also entitled to coverage. La. R.S. §§ 23:1036, 23:1211. Corporate officers who are 10 percent shareholders and sole proprietors may reject coverage. Sheriff Deputies and officials are exempt from coverage. La. R.S. § 23:1034. Other exemptions exist for crews of crop-spraying aircraft, employees of a private unincorporated farm, landmen, and musicians and performers. La. R.S. §§ 23:1035, 23:1045, 23:1047, 23:1048.

B. Employer Rights and Obligations


An injured employee must provide notice of the injury to the employer within 30 days. Failure of notice is excusable. La. R.S. §§ 23:1301-23:1305.

Within 10 days of actual knowledge of injury to an employee resulting in death or in lost time of more than one week, the employer must send a report to the insurer. La. R.S. § 23:1306. No workers’ compensation benefits are payable for the first seven days unless the disability continues for six weeks or longer. La. R.S. § 23:1224.

Workers’ compensation benefits may be offset by unemployment benefits and by payments for medical expenses made by third parties, including a relative or friend of the employee, or by Medicaid or other state medical assistance programs. La. R.S. §§ 23:1212, 23:1225.

No compensation benefits are allowed for an injury caused by the injured employee’s intoxication, unless the intoxication was the result of activities in the pursuit of the employer’s interests, or in which the employer procured the intoxicating beverages or substance and encouraged its use during work hours. La. R.S. § 23:1081.

The employee may choose one treating physician within any field or specialty. The employee may not change treating physicians within the same field or specialty without obtaining prior consent from the employer or the employer’s workers’ compensation carrier. La. R.S. § 23:1121.

An employee’s direct employer may be liable for damages to the employee for knowingly failing to secure compensation or for failing to pay a final judgment within 60 days after the right to appeal is exhausted. La. R.S. § 23:1032.1. Additionally, such employer may be liable for a civil penalty of not more than $250 per employee nor more than $500 per employee, subject to a maximum of $10,000. Willful failure to provide security for compensation is a crime subject to a fine of not more than $10,000 or imprisonment with or without hard labor for no more than one year, or both. La. R.S. §§ 23:1170, 23:1172.

An employer’s failure to make timely benefit payments may result in a penalty assessment of the greater of up to 12 percent of unpaid compensation benefits or $50 per calendar day plus reasonable attorneys’ fees subject to a maximum of $2,010 for any claim. La. R.S. § 23:1201.

VIII. RECORDKEEPING AND POSTERS

A. Personnel Records

Case law establishes that Louisiana employers control their employees’ personnel files and generally have the right to determine their contents. See Doe v. Entergy Servs., Inc., 608 So. 2d 684, 687 (La.App. 3 Cir.1992), writ denied, 613 So. 2d 978 (La.1993), cert. denied, 510 U.S. 816, 114 S.Ct. 66, 126 L.Ed.2d 35. Public school employees’ personnel files are an exception, La. R.S. 17:1232, et seq., including to the general rule that Louisiana does not afford employees a right to access their personnel files. However, any employee with a confirmed positive drug test result has the right, upon written request, to access the drug test records and other records related to any relevant certification or review proceedings. La. R.S. §49:1011. As noted in the drug testing section above, drug testing records must be treated as confidential. Public school employees’ personnel files, and certain personnel records of public employees, may be considered confidential. La. R.S. § 17:1237 and 44:11.

An employer may not maintain protected genetic information or information about a request for or the receipt of genetic services in a general personnel file. Rather, this information must be treated as confidential medical records and maintained separately from the employee’s personnel file. La. R.S. § 23:368.

Upon an employee’s written request, the Louisiana Workforce Commission may release an employee’s wage and employer information for lending purposes, tenant screening, and insurance underwriting only. La. R.S. § 23:905.

B. Work Hours

All employers are required to keep a record for each employee that includes the following information: the employee’s name, address, occupation, the daily and weekly hours worked, and the wages paid each pay period. These records must be retained for one year after the date of the record. La. R.S. § 23:14.
C. Equal Pay—State Employment

A state employer, including any department, office, division, agency, commission, board, committee, or other organizational unit of the state, must create and maintain records reflecting the name, address, and position of each employee and all wages paid to each employee. These records must be kept for up to three years following the employee’s last date of employment. La. R.S. §23:668.

D. Exposure to Toxic Substances

Any current or former employee, or designated representative, must have a right of access to an employer's records of employee exposures to potentially toxic materials or harmful physical agents, employee medical records, and any analyses using employee exposure or medical records as provided for by federal law. La. R.S. § 23:1016. Employers violating this requirement are liable for the employee’s attorneys’ fees.

E. Minors

Employers employing minors must keep an employment certificate on file for each minor that they employ. Persons employing minors in approved, federally funded youth training programs, or those employing minors in theatrical, modeling, motion picture or television production, musical occupations, or in the performing arts are, exempt from this record keeping provision. La. R.S. § 23:182.

F. Unemployment Insurance

Employers must keep true and accurate employment records containing information prescribed by the Office of Employment Security. La. R.S. § 23:1660. The Louisiana Administrative Code requires each employing unit to keep the following records for five years after the calendar year in which the remuneration is paid:

1. For each worker:
   a. name;
   b. Social Security number;
   c. place in which his or her services are performed, or if there is no one such place, then his or her base of operations;
   d. date on which he or she was hired, rehired, or returned to work after temporary layoff, and date separated from work;
   e. his or her remuneration paid for employment occurring on or after July 1, 1940, and period from which payable, showing separately:
      i. cash remuneration, including special payments;
      ii. reasonable cash value or remuneration in any medium other than cash, including special payments; and
      iii. special payments, included in §313.A.1.a and b (any payments such as bonuses, gifts, etc.) and the year in which the services for which the payments were made were rendered;
f. amounts paid him or her as allowance or reimbursement for traveling or other business expenses, and period for which payable; and
g. if he or she is paid:
   i. on a salary basis, his or her wage rate and period covered by such rate;
   ii. on fixed hourly basis, his or her hourly rate and customary scheduled hours per week;
   iii. on fixed daily basis, his or her daily rate and customary scheduled days per week; or
   iv. on piece rate or other variable pay basis, method by which his or her wages are computed.

2. General:
   a. beginning and ending dates of each pay period;
   b. total amount of remuneration paid in any pay period for employment occurring on or after July 1, 1940.

3. Records shall be maintained in such form that it would be possible from an inspection thereof to determine:
   a. earnings by weeks of partial unemployment as defined in § 327.B;
   b. whether any week of partial unemployment claimed by an individual is in fact a week of less than full-time work; and
   c. time lost due to unavailability for work by each worker who may be eligible for partial benefits.

LAC 40:313.

G. Posters

Employers must display posters in the workplace regarding the following topics:

1. Wage Payment (Louisiana Department of Labor), La. R.S. 23:633(D)
2. Employment of Minors (Secretary of the Department of Employment and Training), La. R.S. §23:217
4. Federal Earned Income Tax Credit/Advance Earned Income Credit (Louisiana Department of Labor). This poster is only required of employers with 20 or more full-time or part-time employees. La. R.S. §§ 23:1018.1 and 23:1018.2
5. Equal Opportunity Poster, including age discrimination, sickle cell trait discrimination, and genetic discrimination (Louisiana Department of Labor), La. R.S. § 23:314
6. Smoking in the Workplace (Louisiana Department of Labor), La. R.S. § 40:1300.24
7. Military Leave (Louisiana Department of Labor), La. R.S. §29:422
8. Workers’ Compensation (Louisiana Department of Labor), La. R.S. § 23:1302
9. Whistleblower Protection for Public Employees, must be posted in any building where more than 10 public employees are employed. La. R.S. § 42:1169(F).
10. National Human Trafficking Resource Center hotline information is required at the following locations: every massage parlor, spa, or hotel that has been found to be a public nuisance for prostitution, as set forth in La. R.S. § 13:4711; every strip club or other sexually oriented business, as set forth in La. R.S. § 37:3558(C); every full-service fuel facility adjacent to an interstate highway or highway rest stop; every outpatient abortion facility, as defined by La. R.S. § 40:2175.3; and every hotel, as defined by La. R.S. § 15:541.1(5)(b) and (c). La. R.S. § 15:541.1.
For a listing of required posters by the Louisiana Workforce Commission, go to http://www.laworks.net/Downloads/Downloads_Posters.asp.

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