March 12, 2024

Personnel/HR

Dear Reader:

The following document was created from the CTAS website (ctas.tennessee.edu). This website is maintained by CTAS staff and seeks to represent the most current information regarding issues relative to Tennessee county government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

Sincerely,

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Personnel Authority in Counties

As a general rule, each county official in Tennessee has authority over the employees within his or her office. This authority includes the hiring and firing of office employees and day-to-day office management within the parameters established by state and federal laws. It also includes responsibility for ensuring compliance with applicable laws. The funds available for county employee compensation and benefits is established by action of the county legislative body, but the official retains some discretion with regard to the compensation of individual employees within the office.

State laws, and sometimes resolutions of the county legislative body, establish the way that employees in various county offices are hired. The county mayor has the authority to hire secretaries and assistants where necessary to properly and efficiently transact the business of that office under T.C.A. § 5-6-116, as long as sufficient funds have been appropriated for this purpose. The chief administrative officer of the county highway department in the vast majority of counties has the authority to hire assistants under T.C.A. § 54-7-109, within the amounts set forth for that purpose in the highway budget. County fee officials (which include clerks of court, clerk and masters, county clerks, trustees, registers of deeds and sheriffs) are authorized to hire deputies and assistants as necessary to properly conduct the business of their respective offices under the statutory framework set out in T.C.A. § 8-20-101 et seq., which requires either a letter of agreement or a court order establishing the number and compensation of these employees. The assessor of property hires deputies under the provisions of T.C.A. § 67-1-506.

The county legislative body has basic personnel authority over some employees under general law. Appointed department heads will find the authority under which the employees of their offices are hired either in the state law (public or private act) or in the resolution of the county legislative body which created their department. For example, in counties under the County Financial Management System of 1981, the finance director is authorized to hire employees for that office within the budget established by the county legislative body and in accordance with the policies promulgated by the financial management committee, as provided in T.C.A. § 5-21-107.

Under a state law enacted in 1997, county officials in almost all counties are required to establish written policies for compliance with certain laws, and the county legislative body is required to establish written policies for all employees who are not under written policies established by a county official. Finally, centralized personnel departments have been authorized by private act of the General Assembly in a very limited number of counties, and in some counties civil service laws have been enacted by general law or private act covering the sheriff’s office.

It is important to determine who has the personnel authority in a particular office, as well as the extent of that authority. In general, the authority to hire employees carries with it the authority to terminate those employees; even if employment is subject to approval by the county legislative body, the employee generally may be dismissed without county legislative body approval.

[1] Only Shelby, Davidson, Knox, and Hamilton counties are excluded from the Tennessee County Uniform Highway Law. T.C.A. § 54-7-102.
County Employee Compensation

Reference Number: CTAS-124
The maximum amount that may be expended for employee compensation generally is established in the budget adopted by the county legislative body each year. The discretion to set individual compensation within the office depends on the laws pertaining to the particular county office.

The county mayor determines the compensation of secretaries and assistants in his or her office under T.C.A. § 5-6-116 to the extent that sufficient funds have been appropriated for this purpose. The chief administrative officer of county highway departments under the County Uniform Highway Law establishes the compensation of his or her employees within the budget adopted by the county legislative body pursuant to T.C.A. § 54-7-109. The assessor of property establishes the compensation of the employees of that office within the budget appropriated for that purpose under T.C.A. § 67-1-506.

The number and compensation of deputies and assistants for fee officials (which include clerks of court, clerk and masters, county clerks, trustees, registers of deeds and sheriffs) may be determined either by a letter of agreement or by a court order under T.C.A. § 8-20-101. If the fee official agrees with the amount budgeted by the county legislative body for deputies and assistants for his or her office, or if the fee official pays salaries directly from the fee account under the “fee system,” the official and the county mayor may enter into a letter of agreement. The county legislative body is prohibited from reducing the amount budgeted for sheriff’s office employees below current levels without the consent of the sheriff, but this prohibition does not apply to other offices. Any fee official who does not agree with the budgeted amount must obtain a court order for additional funding by filing a salary suit as outlined below.

Court orders for deputies and assistants are obtained by filing a petition with the appropriate court setting out the necessity for deputies and assistants, the number required and the salary that should be paid to each. The county mayor is named as the defendant in the petition. The county mayor is required to file an answer within five days after service of the petition, either agreeing with or denying the matters stated in the petition. The court will then hold a hearing and issue an order determining the appropriate number and compensation of deputies and assistants.[3]

In 2022, the legislature passed PC 1079, completely rewriting T.C.A. § 8-20-102, which sets out the procedure for conducting a salary suit. It became effective on July 1, 2022.

The court hearing the application for additional personnel does not have the authority to direct the county legislative body to appropriate the funds needed to hire the new employees. If the county legislative body refuses to appropriate the funds required by the court’s order, the official may seek a writ of mandamus to compel it to do so.

The courts in which the petitions are to be filed are set out in T.C.A. § 8-20-101, as follows:

1. Clerks of the circuit, criminal, and special courts file their petitions with one of the judges of their respective courts (but upon request of any party the case must be transferred to a court other than the one the clerk serves).
2. The sheriff files his or her petition with the criminal court, if there is one in the county, and otherwise with the circuit court.
3. Clerks and masters, trustees, county clerks, probate court clerks, and registers file their petitions with one of the chancellors.

Although court orders setting the number and compensation of deputies and assistants can be modified, no court order increasing expenditures will be effective for any fiscal year unless the petition was filed within 30 days after final adoption of the budget for that fiscal year. However, a new officer has 30 days from taking office within which to file a petition.[4] The number and/or compensation of deputies and assistants can be decreased at any time by the official without the necessity of filing a petition.[5] The county mayor may request that the court decrease the number and/or compensation of deputies and assistants.[6] Either party may appeal the court’s decision.[7] The costs of all cases are paid out of the fees collected by the respective offices.[8]

If the county official agrees with the amounts that are set forth in the budget adopted by the
county legislative body, a court order is not necessary. Instead of filing a petition, the official can enter into a letter of agreement with the county mayor, using the form prepared by the state comptroller for this purpose. The letter of agreement is filed with the same court in which a petition would have been filed, but no litigation taxes, court costs or attorneys' fees can be charged in connection with the filing of the letter of agreement.


Comptroller's Form - Letter of Agreement

Reference Number: CTAS-2189

LETTER OF AGREEMENT

COMPENSATION OF EMPLOYEES

_________________________ COUNTY, TENNESSEE

Pursuant to Tennessee Code Annotated, section 8-20-101, this agreement by and between (Official/Office) and (County Mayor/Executive) is for the purpose of establishing the number of employees and the authorized salaries for the (Office).

The parties named herein have agreed and do hereby enter into this agreement according to the provisions set forth herein:

A. The term of this agreement will be from (Beginning Date) to (Ending Date).

B. In order to ensure the efficient operation of the office, it is agreed that the official is authorized to employ the following employees at salaries not to exceed the specified amounts:

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<th>Job Classification</th>
<th>Annual Salary for Each Employee in Job Classification Not to Exceed</th>
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C. It is further agreed that part time help may be employed at a rate of up to $_________ an hour with a total cost not to exceed $_____________ for the term of this agreement.

D. The parties agree to the following special provisions
E. It is further agreed that in no event shall the amount of this agreement exceed $___________.
In witness whereof, the parties have set their signatures.

__________________________________  ______________________________________
(official)                          (date)

__________________________________  ______________________________________
(county mayor/executive)           (date)

Employment at Will

Reference Number: CTAS-125

Tennessee recognizes the doctrine of employment at will, which allows the employer (and the employee) to terminate the employment relationship at any time, with or without cause.\(^1\) Normally, the employer can use whatever criteria he or she desires for hiring decisions in an employment-at-will relationship, unless the criteria is prohibited by law. For example, employment decisions cannot be made on the basis of race, color, religion, sex, national origin, disability, or under most circumstances, age or veteran status.

The United States Supreme Court has placed some additional restrictions on the employment-at-will concept. For example, in *Rutan v. Republican Party of Illinois*,\(^2\) the Court ruled that the First Amendment constitutional rights of applicants for low-level public positions are violated when their employment applications are set aside because they have chosen not to support a particular political party. This same principle is applicable to promotions, transfers and recalls after layoffs. Thus, although the employment-at-will doctrine is still valid, it does have many limitations that the employer must keep in mind.

Unless the employer wishes to further limit the employment-at-will doctrine, he or she must be careful not to provide promises of continued employment. Under some circumstances, courts have found that provisions contained in an employee handbook could constitute a contract between the employer and employee. These courts have ruled that the employer is contractually bound by the rules and regulations set out in the handbook. This means that, regardless of the employer's contention that he or she can fire an employee, if the handbook gives the employee certain rights to continued employment the employer must be prepared to honor them. With this idea in mind, the employer should carefully consider the benefits included in an employee handbook, and the employer should include a clear statement that the policies are not to be construed as creating any kind of contractual obligation.

An employer who wants to retain the employment-at-will doctrine should be careful not to include policies in an employee handbook that could unreasonably hinder the termination process. If the handbook states that the employee can only be terminated for good cause and then sets out a disciplinary procedure or hearing process, the employer has diluted his or her authority to terminate an employee at will.

Another way an employer can inadvertently create a problem is language in the handbook concerning an employee's probationary period. Often an employer will adopt a rule stating that for the first few months of employment an individual is considered a "probationary" employee. Such a rule either states or implies that after the probationary period the employee becomes "permanent." If the employee is viewed as permanent, a court could question the employer's authority to terminate employment without a showing of good cause. One way to avoid this result is to define the terms differently, such as referring to the initial period as "newly hired" and the permanent position as "regular" employment. Also, the reason for making the distinction should be clear. For example, a newly hired employee may not be entitled to full benefits until he or she has been on the job for a certain period of time, and an employee who is entitled to full benefits may be referred to as a regular employee.

An employer who wants to retain employment-at-will status needs to include a statement in the handbook stating that the benefits set out in the rules and regulations are not to be considered an employment contract. The handbook should also state that all employment will be considered employment-at-will. Finally, the statement should advise employees that any of the policies can be amended by the employer at any time. For personnel policies adopted in counties under the provisions of T.C.A. § 5-23-101 *et seq.*, the law expressly provides that such policies are not to be
interpreted as creating an implied contract or otherwise affecting the employment-at-will status of employees.\[3\]

[1] See, e.g., Gregory v. Hunt, 24 F.3d 781 (6th Cir. 1994). This case examines a public employee’s claim that the terms of an employee handbook abrogated the employment-at-will status of the employee; the court found that an implied contract cannot be recognized against the state.


Employment Discrimination

Reference Number: CTAS-170

“Discrimination” is treatment or consideration that is given on the basis of a class or category rather than on individual merit. Various forms of discrimination in the workplace are prohibited under both state and federal laws. These discrimination laws not only prohibit overt acts of discrimination but they also prohibit other forms of discrimination, including harassment if it is on the basis of something that is covered by the discrimination laws. The general framework of discrimination law is set out in the federal statutes; state laws are generally very similar and will not be discussed except where there is a significant difference. Not all discrimination is illegal, and not all bad behavior rises to the level of illegal harassment.

State and Federal Laws Prohibiting Employment Discrimination

Reference Number: CTAS-1047

The primary laws that prohibit discrimination in the workplace are:

1. Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex or national origin;
   (a) The Pregnancy Discrimination Act (PDA) is an amendment to Title VII that prohibits employment discrimination on the basis of pregnancy, childbirth or related medical conditions;
   (b) The Equal Pay Act of 1963 (EPA) is an amendment to the Fair Labor Standards Act (FLSA) that protects men and women who perform substantially equal work in the same establishment from gender-based wage discrimination;
2. The Age Discrimination in Employment Act of 1967 (ADEA) protects individuals who are 40 years of age or older from age-based discrimination; and
3. Title I of the Americans with Disabilities Act of 1990 (ADA) prohibits employment discrimination against qualified individuals with disabilities.

The Equal Employment Opportunity Commission (EEOC) enforces all of these laws. EEOC also provides oversight and coordination of all federal equal employment opportunity regulations, practices and policies.

The Tennessee Human Rights Act, T.C.A. § 4-21-101 et seq., also prohibits employment discrimination on the basis of race, creed, color, religion, sex, age and national origin. The state laws are very similar to the federal laws discussed above.

Protected Classifications

Reference Number: CTAS-1048

Discrimination in the workplace is illegal if it is on the basis of any of the following:

- Race
- Color
Religion
Sex (this classification includes all forms of gender-based discrimination, including sexual harassment, pregnancy discrimination, gender-based wage discrimination, and discrimination based on sexual orientation or gender identity)
National Origin
Age
Disability

The laws protect all employees and applicants for employment from discrimination when it is based on any of these classifications.

Prohibited Discriminatory Practices

Reference Number: CTAS-1049

It is illegal to discriminate in any aspect of employment, including:

- Hiring and firing;
- Compensation, assignment or classification of employees;
- Transfer, promotion, layoff or recall;
- Job advertisements;
- Recruitment;
- Testing;
- Use of company facilities;
- Training and apprenticeship programs;
- Fringe benefits;
- Pay, retirement plans and disability leave; and
- Other terms and conditions of employment.

The laws not only prohibit intentional discrimination, but also practices that have the effect of discriminating against individuals because of their race, color, national origin, religion or sex. This is sometimes referred to as “disparate impact.”

Discriminatory practices also include:

1. Harassment on the basis of race, color, religion, sex, national origin, age or disability (e.g., sexual harassment is a form of discrimination on the basis of sex);
2. Retaliation against an individual for filing a charge of discrimination, participating in an investigation or opposing discriminatory practices;
3. Employment decisions that are based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group or individuals with disabilities; and
4. Denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin or an individual with a disability.

Preventing Discrimination in the Workplace

Reference Number: CTAS-1050

One of the best ways for an employer to eliminate discrimination from the workplace is to examine the criteria he or she uses for making employment decisions to ensure that they are job related and consistent with business necessity. Making sure the criteria used are based on the actual requirements of the job and the needs of the workplace, and evaluating employees on their individual abilities and accomplishments using these criteria, will go a long way toward eliminating discrimination from the workplace.

Employers should take steps to stop discriminatory practices in the workplace before they occur. Making all employees aware of the laws prohibiting discrimination is an important step. Employers are required to post notices advising employees of their rights under these laws. The notices must be placed in an area that is readily accessible to all employees, and accommodations should be
made for persons who have visual or other disabilities that affect their ability to read the notices. EEOC Posters are available free of charge by calling the Equal Employment Opportunity Commission’s Publications Distribution Center at 1-800-669-3362. Posters are also available through the EEOC website.

For additional information concerning the laws that prohibit discrimination in employment, see Federal Laws Prohibiting Job Discrimination Questions and Answers, a publication of the United States Equal Opportunity Commission. These and many other useful EEOC publications are available from the EEOC’s Web site or from the nearest EEOC office:

**Nashville Area Office**
50 Vantage Way
Suite 202
Nashville, TN 37228
Phone: (615) 736-5820
TTY: (615) 736-5870

**Memphis District Office**
1407 Union Avenue
Suite 521
Memphis, TN 38104
Phone: (901) 544-0115
TTY: (901) 544-0112

**Disability Discrimination**

Reference Number: CTAS-169

The federal Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., prohibits discrimination against persons with disabilities in employment under Title I, and mandates their full participation in services and activities offered by local governments under Title II.

Title I of the ADA prohibits employers from discriminating against a qualified individual with a disability in all aspects of employment, including job applications, hiring, advancement, discharge, compensation, training, and any other terms, conditions or privileges of employment. 42 U.S.C. § 12112(a). Local governments must make reasonable accommodations for known physical or mental limitations of an otherwise qualified individual unless to do so would result in an undue hardship. A local government cannot exclude people with disabilities from job opportunities unless they are unable to perform the essential functions of the job with reasonable accommodations.

The employer cannot prefer or select a qualified person without a disability over an equally qualified person with a disability merely because the disabled person will require an accommodation.

The basic rule of Title II of the ADA is that no person is to be excluded from participation in or denied the benefits of the programs, services or activities of local governments on the basis of a disability, nor be subjected to discrimination by local governments. Government services and activities covered under Title II include education, highways and roads, law enforcement, parks, courts, personnel, voting, taxpaying, deed recording, motor vehicle registration, public meetings and public transportation.

Counties are required to have an ADA coordinator and grievance procedures in place to deal with complaints of violations of the ADA. Counties were required to conduct a self-evaluation and make necessary structural changes in existing structures in accordance with detailed accessibility guidelines by specified deadlines; ADA accessibility guidelines also apply for any new construction.

**EEOC Facts about the Americans with Disabilities Act**

**Purpose of ADA**

Reference Number: CTAS-2012

The ADA applies to individuals with disabilities that substantially limit one or more major life activity. The ADA covers people who—

- Are deaf, blind or use a wheelchair,
- Have physical conditions such as epilepsy, diabetes, HIV infection, or severe forms
of arthritis, hypertension, or carpal tunnel syndrome, and
• Have mental impairments such as depression, bipolar disorder, and mental retardation.

The following conditions are NOT covered under the ADA:
• Environmental, cultural, and economic disadvantages
• Homosexuality and bisexuality
• Pregnancy
• Physical characteristics
• Common personality traits
• Normal deviations in height, weight or strength

The purpose of Title I of the Americans with Disabilities Act is to ensure that employers provide reasonable accommodations to individuals with disabilities thereby protecting their employment rights. Rights are protected during the application process, hiring, firing, wages, training, promotions and all other aspects of employment. Employers covered by the ADA must ensure that people with disabilities—
• Have an equal opportunity to apply for and work in jobs for which they are qualified.
• Have an equal opportunity for promotions.
• Have equal access to benefits.
• Are not harassed because of their disability.

Title I of the ADA applies to private employers with 15 or more employees, State and local governments, employment agencies and labor unions. When the ADA went into effect, the Equal Employment Opportunity Commission (EEOC) was tasked with issuing regulations and enforcing Title I of the ADA. The EEOC advised employers that when determining an employee's impairment, the decision should be made without considering steps taken to mitigate the disability. However, in 1999 The Supreme Court ruled in three cases, known as The Sutton Trilogy, that individuals should be evaluated in their mitigated state. Essentially the Supreme Court ruled that if a person is taking measures to correct or mitigate the physical or mental impairment, the effects of those measures must be taken into account when judging whether the person is disabled. Because of the Supreme Court rulings, the EEOC rescinded the parts of its Title I regulations dealing with mitigating measures and revised its Technical Assistance Manual on Title I.

As a result of the Supreme Court rulings, some individuals were punished for taking steps to mitigate their disabilities or impairments. The Amendments Act of 2008 overturns the Sutton cases and all lower court opinions based on the Sutton precedent. Under the Amendments Act, the original definition of disability in the ADA remains the same, but the definition is to be interpreted broadly and not consider mitigating measures when making the disability determination.

The Rehabilitation Act of 1973 prohibits discrimination of individuals with disabilities by recipients of federal funding. Part of the Americans with Disabilities Act is based on Section 504 of the Rehabilitation Act. In the Amendments Act, Congress included an amendment to the Rehabilitation Act whereby the term "disability" in the Rehabilitation Act now has the same meaning as in the ADA act.

### ADA Definitions

Reference Number: CTAS-2013

**Individual with a Disability**

Under the ADA, an individual with a disability is a person who—

1. has a physical or mental impairment that substantially limits one or more major life activities,
2. has a record of such impairment, or
3. is regarded as having such an impairment.
42 U.S.C. § 12102(1).

Persons who are related or have a known association with a disabled person are also protected under Title I. The ADA prohibits discrimination based on an assumption that a relationship with a disabled person will affect job performance. 29 C.F.R. § 1630.8.

While this definition of disability remains the same under the Amendments Act, the Act provides clarification on what is considered a "major life activity" and what is meant by "regarded as having an impairment."

**Major Life Activities**

The original ADA did not offer guidance as to what constitutes a major life activity. The EEOC issued a list in their enforcement guidance that the following life activities should be considered major: walking, seeing, speaking, hearing, breathing, learning, performing manual tasks, caring for oneself, working, sitting, standing, lifting, reaching, thinking, concentrating, interacting with others, and sleeping.

The Amendments Act legislates the EEOC's list with some additions. The Act includes the following two non-exhaustive lists of major life activities:

- **Major Bodily Functions--**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)(B).

Even though the Amendments Act lists various major bodily functions as major life activities, there is still a determination of what constitutes "substantially limited".

**Substantial Limitation**

An individual is covered under the ADA if he or she has a physical or mental impairment that substantially limits one or more major life activity. "Substantially limits" is a measurement of the severity of the disability. The original ADA did not define substantial limitation and it was left up to the EEOC to define by regulation. In section 902.4(1) of the Definition of Disability, the EEOC defined substantial limitation as inability to perform a major life activity or significant restriction as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the average person.

While the Amendments do not define "substantially limits", they do state that the definition of disability should be interpreted broadly and that the question of whether an individual's impairment is a disability should not require extensive analysis. The Act rejects the Supreme Court ruling in *The Sutton Trilogy* that the terms "substantially" and "major" need to be interpreted strictly.


**Episodic or Remission**

There have been various rulings by the courts that impairments that are episodic or in remission may not always be disabilities. The new Rules of Construction Regarding the Definition of Disability state that the definition of disability shall be construed in accordance with the following:

- A. The definition of disability in the Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.
- B. The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.
- C. An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

42 U.S.C. §12102(4)(D)

This means that under the Amendments Act, individuals that have an episodic disability, such as
epilepsy, or individuals that are in remission can argue that they have an actual disability because when active the disability substantially limits a major life activity.

**Mitigating Measures**

When the EEOC first issued guidance documents for enforcing Title I of the ADA, they advised employers not to consider medical treatments or devices used to mitigate an impairment when determining if an impairment should be considered a disability under the ADA. The Supreme Court then ruled in *The Sutton Trilogy* that individuals should be evaluated in their mitigated state so the EEOC changed their enforcement guidelines. The Amendments Act overturns *The Sutton Trilogy* and includes the original EEOC regulations requiring employers not to consider mitigating measures when deciding whether or not an impairment should be considered a disability under the ADA.

The only exemption to the definition of mitigating measures is ordinary glasses and contact lenses. 42 U.S.C. § 12102(4)(E)(ii). They were exempted because of the number of people that would be protected and entitled to reasonable accommodation.

Aside from this exemption, under 42 U.S.C. § 12102(4)(i) when an employer is deciding if an employee is entitled to a workplace accommodation, they must make this decision without regard to the following mitigating measures:

- medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eye glasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
- use of assistive technology;
- reasonable accommodations or auxilliary aids or services; or
- learned behavioral or adaptive neurological modifications.

**Regarded As**

The third prong of the ADA's definition of disability states that an individual with a disability is a person who is "regarded as" having such an impairment. The original ADA did not explain what "regarded as" meant so there were conflicting opinions from the courts and the EEOC.

The Amendments Act provides that an individual is regarded as having a disability if that person has been subjected to discrimination based on an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity. The "regarded as" provision does not apply to impairments that are transitory and minor. Transitory impairments are those with an actual or expected duration of six months or less. 42 U.S.C. § 12102(3).

Employers do not need to believe that a major life activity is substantially limited. Individuals are protected whether they have an actual or perceived impairment, even if the impairment would not limit a major life activity. However, the Act also states that only individuals with actual disabilities are entitled to workplace accommodations.

The Amendments Act clarifies that while an individual who is regarded as having a disability is protected from discrimination under the ADA, such a person is not entitled to reasonable accommodations unless the person actually has a disability.

**Essential Functions**

Employers must also determine the essential functions of a job. Essential functions are the basic job duties that an employee who holds the job must be able to perform. 29 C.F.R. § 1630.2(n)(1). A qualified individual with a disability is a person who satisfies the skill, experience, education, and other job-related requirements of the position and who, with or without a reasonable accommodation, can perform the essential functions of the position. When determining if a job duty is essential, consider—

- if the position exists to perform that function,
- the number of other employees that can perform the function, and
• the degree of skill required to perform the function.

29 C.F.R. § 1630.2(n)(2)

It is important to have job descriptions that detail the essential functions of every job. The EEOC will consider the job descriptions evidence of essential functions as well as—

• the employer’s judgement as to which functions are essential,
• the work experience of past and present employees in the job,
• the time spent performing the job task,
• the consequences if an employee does not perform the task, and
• the collective bargaining agreement (if applicable).

29 C.F.R. § 1630.2(n)(3)

Additional definitions can be found on the following pages:

Reasonable Accommodation Definition
Medical Examinations Defined

Reasonable Accommodation and Undue Hardship

Reference Number: CTAS-2018

A qualified individual with a disability is a person who has the skills and education to perform the essential functions of a job with or without reasonable accommodations as long as the reasonable accommodations do not present an undue hardship to the employer. 42 U.S.C. § 12111(8)

"Reasonable accommodation" and "undue hardship" are two key terms in the ADA. Employers should know when to ask if a reasonable accommodation is needed. After explaining the hiring process, an employer may ask all the applicants if they will need a reasonable accommodation to assist them in completing the application process.

During the hiring process and before a job offer is extended, an employer should not ask an applicant if a reasonable accommodation is needed to perform essential job functions unless the employer knows that the applicant has a disability. An employer may know about a disability because it's obvious or the applicant may have voluntarily disclosed the information.

When an applicant is hired, the employer may ask if a reasonable accommodation is needed to perform the job but all new employees in the same job category must be asked this question.

Reasonable Accommodation Definition

Reference Number: CTAS-2019

A reasonable accommodation is making an adjustment to a job or work environment that enables a qualified employee with a disability to perform the essential job functions. It may also be necessary for an employer to make a reasonable accommodation so that a qualified applicant can participate in the application process. Reasonable accommodations help ensure that qualified individuals with disabilities have rights and privileges equal to those of nondisabled employees. Included in these rights are equal access to information communicated in the work place and access to training programs. 29 C.F.R. § 1630.2(o).

A reasonable accommodation will remove a workplace barrier for an individual with a disability. Workplace barriers include physical objects as well as policies and procedures.

Many disabilities are not obvious and even when a disability is obvious, the individual may not need a reasonable accommodation to perform essential job functions. Reasonable accommodations are provided on an individual basis. An employer's obligation to provide a reasonable accommodation applies only to known physical or mental disabilities. An employer should inquire about the need for a reasonable accommodation when—

• The employer knows the employee has a disability.
• The employer suspects a disability is the cause of unsatisfactory job performance.
• The employer knows a disability prevents the employee from requesting a reasonable accommodation.

If the employee with the disability states that a reasonable accommodation is not needed, the employer has fulfilled its obligation.

When a request for a reasonable accommodation is made, it is up to the employer to determine the appropriate accommodation. There are three categories of reasonable accommodations—

1. Modifications or adjustments to the job application process.
2. Modifications or adjustments to the work environment so an individual with a disability can perform the essential functions of a job.
3. Modifications or adjustments to the work environment so an individual with a disability can enjoy equal benefits and privileges.


The following are examples of reasonable accommodations:

1. Job restructuring (shifting minor responsibilities to others, altering when/how a task is performed).
2. Making existing facilities regularly used by employees readily accessible.
3. Providing additional unpaid leave, when it is not an undue hardship. Paid leave is not required, and an employer is not required to grant leave when it can make another accommodation that will allow the employee to keep working, such as a temporary transfer to another position.
4. Modified or part-time schedule.
5. Modifying workplace policy.
6. Re-assignment to a vacant position – The employer must be qualified for the position. The employer does not have to create a new job or bump an employee out of a position. The re-assignment should be to a position that has equal pay and status, but if a comparable position is not vacant the employer may assign the employee to a vacant position with lower pay if the employee meets the job qualifications.


An employer can not require an employee with a disability to accept a reasonable accommodation if the accommodation is not requested or needed. However, if an employee with a disability turns down an accommodation needed to perform the essential functions of the job, they may be considered not qualified for the job.

Examples of things that are not considered reasonable accommodations include—

1. Elimination of a primary job responsibility (an "essential function" of the position).
2. Lowering production standards (but an employer may be required to make accommodations to allow disabled employees to meet the standards).
3. Providing personal use items such as wheelchairs, eyeglasses, hearing aids or similar devices.

Asking for an Accommodation

Reference Number: CTAS-2020

Employers generally only have to provide a reasonable accommodation when one is requested by a qualified individual with a disability. Individuals with disabilities may request a reasonable accommodation at any time during the employment process, including the application process. The request is generally a statement in plain English. It does not have to include the terms "ADA" or "reasonable accommodation". While the request does not have to be in writing, employers may prefer receiving something in writing to document the request. Family members, friends, and counselors may request an accommodation for an individual with a disability.
Once a request is made, the employer may want confirmation that the individual's medical condition meets the ADA's definition of disability. An employer is entitled to ask for medical documentation of the disability and its limitations if the disability is not obvious. If the medical condition does not meet the ADA's definition of disability, then a reasonable accommodation is not required.

Employer's can use this form to request medical documentation.

After receiving the request for reasonable accommodation and verifying that the condition meets the definition of disability, usually the employer and the individual with the disability discuss possible reasonable accommodations to try to determine what accommodation might work best. During this conversation it is important for the individual with the disability to describe the problems posed by the workplace barrier.

If the employer does not receive sufficient information, an explanation as to what additional information is needed should be provided to the individual with the disability. The employer should limit requests for information to the disability in question.

Providing Reasonable Accommodation

Reference Number: CTAS-2021

The ADA does not require employers to have specific procedures to provide a reasonable accommodation but generally written procedures are helpful. The Amendments Act added a provision to the ADA stating that an accommodation is not required if altering the policies, practices or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods and services.

When implementing reasonable accommodations it is important to—

- Develop a realistic time frame that promptly responds to the request.
- Keep lines of communication open.
- Use outside resources if necessary.
- Explain to the individual with the disability the reasonable accommodation and why it was chosen.

The employer may choose among reasonable accommodations as long as the chosen accommodation is effective (i.e., it removes the workplace barrier at issue). The employer may suggest alternative accommodations and the employer may choose the less expensive alternative or the one that is easier to provide. The employer is not required to give the employee the accommodation that the individual wants. Similarly, the employee is not required to accept the accommodation offered by the employer; however, as long as the accommodation offered by the employer is reasonable and effective, the employer has fulfilled his or her obligation to provide a reasonable accommodation. 29 C.F.R. § 1630.9(d).

It is not necessary to contact the EEOC about requested accommodations. However, if you have difficulty identifying an appropriate accommodation you may contact the EEOC or State and local vocational rehabilitation agencies and disability agencies for assistance.

Examples of reasonable accommodations for visual disabilities include—

- An external computer screen magnifier
- An accessible Web site
- Software that will read information on the computer screen
- Written materials in accessible format such as Braille or large print
- Use of guide dog in the workplace

Click here for more information on accommodating vision impairments under the ADA.

An employer should not disclose to other employees that an employee is receiving a reasonable accommodation. The ADA prohibits disclosure of medical information and telling employees that a co-worker is receiving a reasonable accommodation discloses that the co-worker has a disability.
Undue Hardship

Reference Number: CTAS-2022

Employers are not required to implement any reasonable accommodation that would present an undue hardship on the business. Undue hardship means that the accommodation would be unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature of operation of the business. Factors to be considered include the cost of the accommodation, the size and financial resources of the employer, and the nature and structure of the employer's business. An employer is not required to lower production standards or eliminate essential job functions to implement a reasonable accommodation. 42 U.S.C. § 12111(10).

If an employer is part of a larger organization, the structure and assets of the larger organization would be considered when determining if an accommodation is an undue hardship. Larger employers are usually expected to make accommodations that require greater effort and expense than would be required of a smaller employer.

Employers should look for outside funding when reasonable accommodations are costly. Vocational rehabilitation agencies may provide funds and the cost of providing accommodations can be offset by state and federal tax credits or deductions. Also, the individual with the disability should be given the opportunity to provide the accommodation or help pay for an accommodation that creates an undue hardship on an employer.

Employers are liable for contractual relationships. 29 C.F.R. § 1630.6.

Under Title III of the ADA, if your business is a place of public accommodation then you must provide accessibility to the general public. Title III also requires places of public accommodation and commercial facilities to provide accessibility during new construction or renovation.

Medical Examinations under ADA

Reference Number: CTAS-2023

Prior to the passage of the ADA, employers sometimes used medical information to exclude applicants from jobs. Sometimes employers used medical information to discriminate against disabled individuals. The ADA was passed to protect the right of disabled applicants and employees to be judged on merit alone but also to protect the right of employers to ensure job tasks are performed correctly and efficiently.

If an applicant for a job is disabled, an employer may be tempted to ask the applicant to participate in a medical examination. Employers are prohibited from asking any disability related questions or requiring a medical examination prior to making a job offer even if the questions relate to the job. 29 C.F.R. § 1630.13(a). Under the ADA, an employer may not ask on a job application or in an interview whether or not the applicant is disabled. Suggested interview topics include education, training, and skills needed for the position. An employer may ask the applicant if he/she can perform specific job functions as long as the questions are not phrased in terms of a disability. You can also ask an applicant to describe or demonstrate how, with or without reasonable accommodation, they would perform a job function. 42 U.S.C. § 12112(d)(2).

Do not ask about any physical or mental disability or how the person was disabled, any medication used by the applicant, or the applicant's worker's compensation history.

Job offers can be conditioned upon a physical examination, but only if such an examination is required of all applicants for similar jobs, and only if it is job related and consistent with the employer's business needs. 42 U.S.C. §12112(d)(3). After an applicant is hired, all required medical examinations must be job related. 42 U.S.C. §12112(d)(4)(A). The employer must require medical evaluations of all new employees in the same job category. If an applicant is not hired because of a disability found during the medical evaluation, the employer must show that the reasons for not hiring the person are job related and necessary and that there is no reasonable accommodation applicable to the situation. Voluntary health screenings and medical examinations that are part of an employee health program are acceptable. 42 U.S.C. § 12112(d)(4)(B). The results of all medical examinations are confidential.

Adhering to these ADA requirements should prevent an employer from basing a hiring decision on
assumptions about a disability.

**Disability-Related Inquiry**

Reference Number: CTAS-2024

A disability-related inquiry is a question or series of questions that result in information about a disability. Questions to avoid include—

- Asking if the person has or ever had a disability.
- Asking a person how he/she became disabled and the severity of the disability.
- Asking a person to provide medical documentation about a disability.
- Asking co-workers, family members or friends about an employee’s disability.
- Asking about genetic information.
- Asking about worker's compensation claims.
- Asking about drugs and medications currently being taken or taken in the past.
- Asking broad questions about impairments that result in information about a disability.

Any question that does not elicit information about a disability is not prohibited under the ADA. Questions such as—

- Asking about an employee's well being, a cold, a divorce, etc.
- Asking about nondisability-related impairments.
- Asking an employee if he/she can perform the job functions.
- Asking an employee if he/she has been drinking or has been using drugs.
- Asking for contacts/phone numbers in case of a medical emergency.
- Asking a pregnant employee when the baby is due….make sure the employee is pregnant before asking this question.

**Medical Examinations Defined**

Reference Number: CTAS-2025

A medical examination is any procedure or test that seeks information about a person’s health. The guidance on Pre-employment Questions and Medical Examinations lists the following seven factors that can be used to determine if a test is a medical examination.

- Is the test administered by a health care professional?
- Is the test analyzed/interpreted by a health care professional?
- Is the test designed to reveal a physical impairment?
- Is the test invasive?
- Does the test measure employee's performance of a task or the physiological responses to performing the task?
- Is the test normally given in a medical setting?
- Is medical equipment used for the test?

Medical examinations include—

- Vision tests,
- Tests to check for genetic markers,
- Blood pressure screening and cholesterol testing,
- Nerve conduction tests,
- Range-of-motion tests,
- Pulmonary function tests,
- Tests to check for mental disorder or impairment and
- Diagnostic procedures.
Under the ADA the following tests are NOT considered medical examinations:

- Drug tests.
- Physical agility and fitness tests.
- Reading tests to demonstrate the ability to perform job functions.
- Psychological tests that measure personality traits.
- Polygraph examinations.

Under the ADA, current supervisors may not pass on medical information about employees interviewing in a different department or for a different job. Current employees who apply for a new job within the same organization should be treated the same as other applicants for the job.

**Job-Related Medical Examinations**

Reference Number: CTAS-2026

Employers may request an employee complete a medical examination when the examination is job-related and consistent with business necessity. 29 C.F.R. § 1630.10(a). The employer must have a reasonable belief that the employee's ability to perform their job is being impaired by a medical condition or that the employee poses a direct threat due to a medical condition.

A medical examination is also considered job-related and consistent with business necessity when—

- It is a follow-up to a request for a reasonable accommodation or
- It is a periodic medical examination.

It is important that an employer's belief that a medical condition is affecting an employee's ability to perform essential job functions be based on objective evidence. The Amendments Act added a provision that employers cannot screen out an applicant because of uncorrected vision unless it is job-related and consistent with business necessity. 29 C.F.R. § 1630.10(b).

When considering the reliability of information learned from another person, employers should consider—

- The relationship of the person providing the information to the employee in question.
- The seriousness of the medical condition.
- The motivation of the person providing the information.
- How the person learned the information.
- Any other evidence that may affect the reliability of the information.

**FAQ's about Medical Examinations under the ADA**

Reference Number: CTAS-2027

1. What happens if an employee refuses to participate in a requested medical examination?

   It depends on why the employee was asked to participate in a medical examination. If the employee's job performance is suffering and a medical condition is suspected but the employee refuses the exam, discipline should focus on the employee's performance in accordance with company policy.

2. What happens if an employee requests a reasonable accommodation but provides insufficient documentation from his/her doctor to substantiate the ADA disability?

   The employer should explain why the information is insufficient and give the employee a chance to provide the missing information. The employer can contact the employee's doctor (with the employee's consent) to obtain the missing information. As a last resort, the employer can require the employee go to a health care provider of the employer's choice.

   Documentation may be insufficient when—
• The health care professional does not have the expertise to analyze the employee's condition.
• The documentation does not specify the limitations due to the disability.
• Any other factors that indicate the information is fraudulent.
  Employers are not required to provide a reasonable accommodation until they have sufficient documentation.

3. What happens if an employer believes an employee is a direct threat to other employees and to the organization?

Because the employer is responsible for assessing whether or not an employee poses a direct threat, the employer can have the employee examined by its own health care provider. The health care provider selected should have an expertise in the employee's suspected problem and should be able to provide current information.

Periodic Testing and Monitoring under the ADA

Reference Number: CTAS-2031
Periodic medical monitoring is sometimes required for job positions that deal with public safety. For example, police officers and firefighters may be required to pass an annual medical examination. This is the exception to the rule; in most cases employers can not require periodic medical monitoring.

An employer may require an employee who has completed alcohol rehabilitation to be periodically tested for alcohol if the employer has reasonable belief that the employee will pose a direct threat without testing.

Employee Assistance Program (EAP) counselors may ask employees about physical and mental conditions if the EAP counselor does not work for the employee's employer. EAP counselors must keep confidential any information revealed by employees. EAP counselors have no power over employment decisions.

There are other federal laws that require an employer to make disability-related inquiries and that may require employees to complete a medical evaluation. Compliance with these laws does not violate the ADA.

Disability-related inquiries and medical examinations that are part of a voluntary wellness program do not violate the ADA. A wellness program is voluntary if employers do not require participation and do not penalize employees for not participating.

For affirmative action purposes, employers may ask employees to voluntarily self-identify as persons with disabilities.

Safety Concerns

Reference Number: CTAS-2028
Employers can impose qualification standards intended to exclude individuals with a disability that pose a direct threat (either health or safety) to themself or others if a reasonable accommodation can not be found. A direct threat is a significant risk of substantial harm. Before asking medical questions or arranging for a medical examination, make sure that poor job performance is being caused by a disability. If job functions are not being performed correctly, the reason may not be medical and the problem should be handled in accordance with company performance policies.

You can not refuse to hire or fire an employee because of a slightly increased or speculative risk of harm to himself or others. Under the ADA employers must make individualized decisions based on factual evidence, not assumptions or generalizations, ignorance, fear, patronizing attitudes, or stereotypes. By doing so the needs of the people with disabilities are balanced against the interests of employers in providing a safe workplace.

An employer should—
• Assess the individual's ability to safely perform the essential functions of the job based on objective evidence and medical judgment.
• Consider the duration of the risk, severity of potential harm, and the probability that harm will occur.

Do not base the decision on generalizations or unfounded fears. The harm must be serious and likely to occur and there must be no reasonable accommodation to reduce the risk.

29 C.F.R. § 1630.2(r)

Emergency Procedures under the ADA

The ADA does not prevent employers from obtaining and using employee medical information for an emergency evacuation plan. There are three different times an employer may obtain this information.

1. An employer can ask all new hires if they will require assistance during an emergency.
2. An employer can periodically ask all employees to self-identify whether they will need assistance.
3. An employer can ask an employee with a known disability if assistance is required.

An employer may ask individuals to describe what kind of assistance is required in case of an evacuation. Employees should inform their employer if a special medication, equipment, or device is needed. Employees need only share information necessary for an emergency evacuation; in most cases it won't be necessary to share details about the employee's medical condition.

Information acquired for emergency purposes is kept confidential. The ADA allows that the information may be shared with first aid and safety personnel. In the case of an emergency evacuation plan, the information should be shared with anyone who needs the information to fulfill their responsibilities under the plan.

Drug and Alcohol Use

Reference Number: CTAS-2029

Current users of illegal drugs (including illegal use of prescription drugs) and alcohol are not covered by the ADA. 42 U.S.C. § 12114(a). Tests for drug and alcohol usage are not subject to the ADA restrictions on medical exams. The ADA does not exclude—

• Individuals who are completing or have completed a rehabilitation program and are no longer using drugs.
• Individuals who are “believed” to be using drugs.

42 U.S.C. § 12114(b).

The ADA protects recovering addicts from discrimination on the basis of their status as an addict and a reasonable accommodation for an addict may include time off for treatment.

Under the ADA, recovering alcoholics and drug addicts are held to the same job performance standards as all other employees.

For additional information about drug testing, see Governmental Employee Drug Testing-The Constitutional Issues.

Insurance and Sick Leave

Reference Number: CTAS-2030

Insurance

Employers are not required to provide to individuals with disabilities additional insurance other than similar coverage provided to non-disabled individuals. If health insurance coverage is limited to a certain number of treatments per year and an employee with a disability needs more treatments, under the ADA the employer is not required to pay for the additional treatments. Also
under the ADA, an employer is not required to change insurance coverage if the current plan
excludes or limits coverage for a new employee's pre-existing condition. 29 C.F.R. § 1630.5.

Sick Leave

Under the ADA an employer may—

- Request a doctor's note to justify an employee's use of sick leave.
- Request periodic updates when an employee is on extended leave because of a
  medical condition and has not specified a return date or has requested additional
days of leave.
- Make a disability-related inquiry or require a medical examination when an
  employee who has been on extended leave for a medical condition comes back to
  work if the employer has a reasonable belief that the employee's present skill level
  is impaired by the medical condition.

Technical Assistance

Reference Number: CTAS-2039

Technical assistance is the dissemination of information to assist the public, including individuals
protected by the ADA and entities covered by the ADA. Information may be disseminated by using—

- Audio visual materials,
- Pamphlets,
- Manuals,
- Electronic bulletin boards,
- Checklists, and
- Training.

To help educate and raise public awareness of the ADA, the Department provides—

- Factsheets and pamphlets in different accessible formats,
- Speakers for workshops, seminars, classes, and conferences,
- An ADA telephone information line, and
- Access to ADA documents through an electronic bulletin board.

Available factsheets and pamphlets include—

- Facts About the Americans with Disabilities Act
- The ADA: Questions and Answers
- The ADA: Your Responsibilities as an Employer
- The Americans with Disabilities Act: A Primer for Small Business
- Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the
  Americans with Disabilities Act
- Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees
  Under the Americans with Disabilities Act (ADA)
- Questions and Answers: Enforcement Guidance On Disability-Related Inquiries And Medical
  Examinations Of Employees Under The Americans With Disabilities Act (ADA)
- Fact Sheet on Obtaining and Using Employee Medical Information as Part of Emergency
  Evacuation Procedures

For additional information, contact—

U.S. Department of Justice
950 Pennsylvania Avenue, NW
Civil Rights Division
Disability Rights Section, NYA
Washington, D.C. 20530
Race/Color Discrimination

Reference Number: CTAS-1051

In addition to discrimination based directly on race or color, Title VII prohibits employment decisions based on stereotypes or assumptions about abilities, traits or the performance of individuals of certain racial groups. Title VII prohibits both intentional discrimination and neutral job policies that disproportionately exclude minorities and that are not job related.

Title VII prohibits discrimination on the basis of immutable characteristics associated with race, such as skin color, hair texture or certain facial features, even though not all members of the same race share the same characteristic. Title VII also prohibits discrimination on the basis of a condition that predominantly affects one race, unless the practice is job related and consistent with business necessity.

Minority employees cannot be segregated by physically isolating them from other employees or from customer contact. It also is illegal to exclude minorities from certain positions, or to group or categorize employees or jobs so that certain jobs are generally held by minorities.

Coding applications or resumes to indicate an applicant’s race can be evidence of discrimination if minorities are excluded from employment or from certain positions. Also, requesting information that discloses or tends to indicate an applicant’s race suggests that race will be unlawfully used in hiring decisions.

EEOC Facts about Race/Color Discrimination

Age Discrimination

Reference Number: CTAS-1052

Both the federal Age Discrimination in Employment Act (ADEA) and the Tennessee Human Rights Act, T.C.A. § 4-21-101 et seq., protect individuals who are age 40 and older from employment discrimination based on age.\[1\] It is unlawful to include age preferences, limitations, or specifications in job notices or advertisements, except in those very rare circumstances where age is a bona fide occupational qualification (BFOQ) reasonably necessary to the essence of the business. The ADEA applies to states and local governments regardless of the number of employees they may have.\[2\]

These laws also prohibit forced retirement of employees on the basis of age unless a specific exemption applies (law enforcement and firefighters are exempt and may be compelled to retire after the age of 65). The law does not, however, prohibit a plan permitting individuals to elect early retirement at a specified age, nor is it unlawful for a plan to require early retirement for reasons other than age.

The ADEA does not specifically prohibit asking an applicant’s age or date of birth, but such requests are closely scrutinized to ensure they are for a lawful purpose and not for a purpose prohibited under the ADEA.

EEOC Facts about Age Discrimination

\[1\] The U. S. Supreme Court has held that the ADEA did not abrogate states’ 11th Amendment immunity and therefore employees cannot bring suit against state employers under the ADEA unless the state has waived its sovereign immunity; the opinion also appears to include local governments within the protection of the 11th Amendment. *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S.Ct. 631 (2000). However, in a 2001 case concerning the Americans with Disabilities Act, the Supreme Court directly addressed whether 11th Amendment immunity extends to cities and counties and found that it does not. *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955 (2001); see also *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Ernst v. Rising*, 427 F.3d 351 (6th


## National Origin Discrimination

**Reference Number: CTAS-1053**

Title VII prohibits employment discrimination on the basis of national origin (as well as race, color, religion and sex). It is unlawful to discriminate against any employee or applicant because of birthplace, ancestry, culture or linguistic characteristics common to a specific ethnic group; membership or association with specific ethnic promotion groups; attendance or participation in schools, churches, temples or mosques generally associated with a national origin group; or a surname associated with a national origin group.

“English Only” rules violate Title VII unless an employer can show that requiring employees to speak English on the job at all times is critical for conducting business, and the employees must be told when they must speak English and the consequences for violating the rule.

Requiring applicants to be fluent in English may violate Title VII if the rule is adopted to exclude individuals of a particular national origin and it is not related to job performance. An employer must show a legitimate non-discriminatory reason for the denial of employment opportunity because of an individual’s accent or manner of speaking. Investigations focus on whether the accent or manner of speaking have a detrimental effect on job performance.

Harassment on the basis of national origin also is a violation of Title VII. Employers can be liable for harassment by agents and supervisors even if the acts were unauthorized or expressly forbidden; under certain circumstances, the employer may be liable for workplace harassment by non-employees.

Under federal law, employees must provide to their employers the information required on I-9 forms, and employers must verify the employee’s eligibility to work in the United States. Employers cannot discriminate by having only certain groups provide this information – all employees are required to prove that they are legally authorized to work in the United States.

**EEOC National Origin Discrimination**

## Sex Discrimination

**Reference Number: CTAS-1054**

Discrimination based on gender in any aspect of employment is prohibited. This includes sex discrimination, sexual harassment, gender-based wage discrimination, and discrimination based on pregnancy or related medical conditions.

## Sexual Harassment

**Reference Number: CTAS-1055**

Sexual harassment is a form of sex discrimination prohibited under Title VII. According to the EEOC, unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual’s employment, unreasonably interferes with an individual’s work performance, or creates an intimidating, hostile or offensive work environment. Sexual harassment can occur in a variety of circumstances. The victim does not have to be of the opposite sex. The victim does not have to be the person harassed but can be anyone who is affected by the offensive conduct. The harasser can be the victim’s supervisor, an agent of the employer, a supervisor in another area, a co-worker or a non-employee.

## Pregnancy Discrimination

**Reference Number: CTAS-1056**
The federal Pregnancy Discrimination Act (PDA) is an amendment to Title VII that declares discrimination on the basis of pregnancy, childbirth or related medical conditions to be unlawful sex discrimination under Title VII. Women affected by pregnancy or related conditions must be treated the same as other applicants or employees with similar conditions, abilities or limitations. An employer cannot refuse to hire a pregnant applicant as long as she is able to perform the major functions of the job, and the employer cannot refuse to hire the person because of the prejudices of the employer or those of clients, customers or co-workers.

Pregnancy cannot be singled out for special procedures. The pregnant employee must be treated the same as any other employee in a similar situation. For example, if the employer requires a doctor’s statement prior to granting sick leave, the employer may require a pregnant employee to provide a doctor’s statement if the employee requests sick leave.

If a pregnant employee is temporarily unable to perform her job, the employer must treat her the same as any other temporarily disabled employee (e.g., modified tasks, alternative assignments, disability leave, or leave without pay, if the employer provides these benefits to other workers who are temporarily disabled).

Pregnant employees must be permitted to work as long as they are able to perform their jobs. Employers cannot make pre-determined rules requiring employees to remain off work a specified period of time either before or following childbirth. Employers must hold open a job for pregnancy-related absences for as long as the employer would for employees with other kinds of temporary disabilities.

Health insurance must cover pregnancy-related conditions on the same basis as other medical conditions. No increased or additional deductible can be imposed. Also, pregnancy-related benefits cannot be limited to married employees.


Pregnant Workers Fairness Act

State Level

Effective October 1, 2020, state law found at T.C.A. § 50-10-101 et seq., the Tennessee Pregnant Workers Fairness Act, requires employers with more than 15 employees to make reasonable accommodations for medical needs arising from pregnancy, childbirth, or related medical conditions of employees or applicants for employment. "Reasonable accommodation" may include: making existing facilities used by employees readily accessible and usable; providing more frequent, longer, or flexible breaks; providing a private place, other than a bathroom stall, for the purpose of expressing milk; modifying food or drink policy; providing modified seating or allowing the employee to sit more frequently if the job requires standing; providing assistance with manual labor and limits on lifting; authorizing a temporary transfer to a vacant position; providing job restructuring or light duty, if available; acquiring or modifying of equipment, devices, or an employee's work station; modifying work schedules; and allowing flexible scheduling for prenatal visits. The employer may request medical certification if it is required of other employees with medical conditions.

Federal Level

The Pregnant Workers Fairness Act (PWFA) went into effect on June 27, 2023. The law requires covered employers, which include counties, to provide "reasonable accommodations” to a qualified employee’s known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation would cause an undue hardship for the employer. While existing laws make it illegal to take an adverse action or discriminate against a person based on pregnancy, childbirth, or related medical conditions, the PWFA only applies to accommodations. Further, the PWFA does not replace federal, state, or local laws that are more protective of a qualified employee affected by pregnancy, childbirth, or related medical conditions. 42 U.S.C.A. § 2000gg – 1.

The term "qualified employee" includes an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the job, except that an employee or applicant shall be considered qualified if the following conditions are met: 1) any inability to perform an essential function is for a temporary period; 2) the essential function could be
performed in the near future; and 3) the inability to perform the essential function can be reasonably accommodated. 42 U.S.C.A. § 2000gg.

The terms "reasonable accommodation" and "undue hardship" have the same meaning as defined under section 101 of the Americans with Disabilities Act (42 U.S.C.A. § 12111).

The FWPA also prohibits covered employers from:

- Requiring a qualified employee to accept an accommodation without an interactive discussion
- Denying a qualified employee an employment opportunity based on the person’s need for a reasonable accommodation.
- Requiring a qualified employee to take leave, whether paid or unpaid, if another accommodation could be made that would allow the employee to keep working; or
- Taking an adverse action against a qualified employee for requesting or using reasonable accommodation.

The Equal Employment Opportunity Commission (EEOC) is responsible for enforcing and issuing rules for the implementation of the PWFA. The rules must include examples of reasonable accommodations to address known limitations related to pregnancy, childbirth, and related medical conditions. The final rules will be available before December 29, 2023. More information and resources about the PWFA are available at EEOC/What You Should Know About the PWFA.

Gender-Based Wage Discrimination

Reference Number: CTAS-1057

The Equal Pay Act (29 U.S.C. § 206(d)) is an amendment to the federal Fair Labor Standards Act that prohibits discrimination on the basis of gender in the payment of wages or benefits, where men and women perform work of similar skill, effort and responsibility for the same employer under similar working conditions.

Note that a violation of the Equal Pay Act can be found where a different wage was paid to a person who worked in the same position before or after a person of the opposite sex.

Sexual Orientation and Gender Identity Discrimination

Reference Number: CTAS-2483

Title VII prohibits an employer from discriminating against an applicant or employee with regard to hiring, firing, or taking other adverse actions related to terms of employment based on race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2(a)(1). In Bostock v. Clayton County. Georgia, 140 S.Ct. 1731, the United States Supreme Court held that when an employer discriminates against a person based on their sexual orientation or gender identity, it violates Title VII. The Court reasoned that if the employer fires the male employee for no reason other than the fact he is attracted to men but does not fire a woman who is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. The Court explained that it is impossible to discriminate against a person for being homosexual or transgender without also discriminating against that individual based on sex. If changing the employee’s sex would have yielded a different choice by the employer—a statutory violation of Title VII has occurred.

Under Title VII, it is unlawful to subject an employee to discrimination, harassment, or retaliation based on sexual orientation or gender identity. Examples of practices that may violate Title VII based on sexual orientation or gender identity may include, but are not limited to:

- Making offensive or derogatory remarks about someone’s sexual orientation or gender Identity (e.g., being gay or straight)
- Intentionally and repeatedly using the wrong name or pronouns to refer to a transgender person
- Keeping LGBTQ+ employees out of public facing positions
- Prohibiting a transgender person from dressing or presenting consistent with the person’s
gender identity

- Retaliating against a person based on the person’s sexual orientation or gender identity

The EEOC has also taken the position that employers may not deny employees equal access to bathrooms, showers, or locker rooms that correspond with the person’s gender identity.

More information about discrimination based on sexual orientation can be found on the EEOC's website.

Religious Discrimination

Reference Number: CTAS-1058

Title VII prohibits discrimination on the basis of religion, and it also requires employers to reasonably accommodate the religious practices of an employee or applicant, unless to do so would create an undue hardship on the employer. Flexible scheduling, voluntary swaps, job reassignments and lateral transfers are examples of accommodation.

Employers cannot schedule examinations or other selection activities in conflict with a current or prospective employee’s religious needs, inquire about an applicant’s future availability at certain times, maintain a restrictive dress code, or refuse to allow observance of a Sabbath or religious holiday, unless the employer can show that it would create an undue hardship.

An employer can claim undue hardship if allowing the accommodation would result in more than ordinary administrative costs. Like all other forms of discrimination, harassment based on religion also is prohibited.

EEOC Facts About Religious Discrimination

Genetic Discrimination

Reference Number: CTAS-2184

Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA) took effect on November 21, 2009. Under Title II of GINA it is illegal to discriminate against employees or applicants because of genetic information. Title II of GINA prohibits the use of genetic information in making employment decisions, restricts employers and other entities covered by Title II from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information.

Genetic information for an individual or a family includes the following—

- Information about genetic tests and diseases or disorders
- Individual’s request for, or receipt of, genetic services
- Participation in clinical research that includes genetic services
- Genetic information of a fetus or a legally held embryo

An employer may never use genetic information to make any employment decision including hiring, firing, pay, job assignments, promotions, layoffs, training and fringe benefits. Genetic information is not relevant to an individual’s current ability to work. The EEOC website contains additional information on GINA.

Workplace Harassment

Reference Number: CTAS-171

Discrimination in the workplace on the basis of race, color, religion, national origin, sex (whether or not of a sexual nature), age or disability is illegal. Harassment based on any of those factors also is illegal. In addition, an employer can be held liable for retaliation against an individual for opposition to prohibited discrimination or for participation in the complaint process, often referred to as “protected activity.” The most common forms of workplace harassment are sexual harassment and racial harassment. (See EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, 6/18/99).
Two United States Supreme Court cases dealing with sexual harassment, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998), changed the way courts look at sexual harassment as well as all other forms of workplace harassment. Prior to these cases, sexual harassment had been thought of separately from any other form of unlawful workplace harassment. After the decisions in *Ellerth* and *Faragher*, however, all unlawful workplace harassment is handled in much the same manner.

The biggest impact of these two cases is the idea of strict liability: The employer is strictly liable for workplace harassment by a supervisor that results in a tangible employment action. There is no defense to this kind of action. Prevention is the only way to avoid liability for this type of harassment.

After the *Ellerth* and *Faragher* cases, there are two basic types of harassment. The first type involves a “tangible employment action” (formerly “quid pro quo”). The other is what is known as “hostile work environment,” which involves conduct that is severe or pervasive.

After the United States Supreme Court decisions in *Ellerth* and *Faragher*, it is even more important for employers to be informed about potential problems in the workplace, and to take affirmative steps to prevent and/or stop unlawful harassment. It is now clear that supervisors act on behalf of the employer, and the employer will be held liable for their unlawful conduct that results in a tangible employment action, even if the employer had no knowledge of the situation. In other cases of workplace harassment (those that create a hostile work environment), the employer may defend the action if it can show that: (1) the employer exercised reasonable care to prevent and promptly correct any harassment; and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer, or to avoid harm otherwise. A strong policy against this type of behavior, and effective complaint/investigatory procedures with appropriate corrective action timely administered, are a must for any employer who wants to avoid liability.

**Employer Strict Liability**

Reference Number: CTAS-1064

An employer always will be held liable for unlawful workplace harassment by a supervisor that results in a tangible employment action. It is therefore important to determine who is considered to be a “supervisor.”

1. A supervisor is one who has authority to undertake or recommend tangible employment actions affecting the employee. As long as a person’s recommendation is given substantial weight, the person does not have to be the final decision maker; or

2. A supervisor is one who has authority to direct the employee’s daily work activities. Directing an employee’s daily work activities includes the authority to increase the employee’s workload or assign undesirable tasks, and not simply relaying other officials’ instructions regarding work assignments. However, direction of only a limited number of assignments, such as someone who coordinates a work project of limited scope, is not a “supervisor.”

Sometimes an employer can be held liable for the actions of a supervisor who does not have actual authority over the employee, if the employee reasonably believes that the harasser has such power. If the harasser has no direct authority, and there is no reasonable belief that such authority exists, then the employer’s liability for harassment will be the same as for harassment by a co-worker.

**Tangible Employment Action**

Reference Number: CTAS-1065

Tangible employment actions are decisions that significantly change an employee’s employment status. Examples include decisions involving hiring, firing, promoting, demoting, compensation, benefits and reassignments. A tangible employment action:

- requires an official act of the enterprise
- usually is documented in company records
may be subject to review by higher level supervisors
often requires formal approval of the enterprise and use of its internal processes
usually inflicts direct economic harm
in most instances can only be caused by a supervisor or other person acting on behalf of the company

Any employment action is “tangible” if it results in a significant change in employment status. Conversely, an employment action is not “tangible” if it results only in an insignificant change. Unfulfilled threats are insufficient.

If a supervisor undertakes or recommends a tangible job action based on a subordinate’s response to unwelcome sexual demands, the employer is strictly liable. The result is the same regardless of whether the employee rejects the supervisor’s demands and is subjected to an adverse action, or whether the employee submits to the demands and receives a tangible job benefit.

If a challenged action is not “tangible,” it still may be considered as part of a hostile environment claim.

The only way to avoid liability for unlawful harassment that results in a tangible employment action is to prevent it from happening. Supervisors must be educated on this point. Employers cannot afford to allow this type of discrimination to occur.

Defending Against Workplace Harassment Claims

Reference Number: CTAS-1066

In harassment cases that do not involve harassment by a supervisor that resulted in a tangible employment action, an employer has a defense if it can prove two things:

1. The employer exercised reasonable care to prevent and promptly correct any harassment; and
2. The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or to avoid harm otherwise.

The first prong of the test requires the employer to show that it took reasonable care to prevent and promptly correct any harassment. Simply having a policy is not enough; the policy must be implemented. Not having a formal policy will not necessarily defeat the defense if the employer exercised sufficient care through other means, but not having a policy makes it very difficult for an employer to show that it exercised reasonable care. Therefore, it is best to have a policy in place.

Policy and Complaint Procedures

Reference Number: CTAS-1067

It is generally necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures. At a minimum, the policy should contain:

1. A clear explanation of prohibited conduct;
2. Assurance that employees who make complaints or provide information related to such complaints will be protected against retaliation;
3. A clearly described complaint process that provides accessible avenues of complaint;
4. Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
5. A complaint process that provides a prompt, thorough and impartial investigation; and
6. Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

Non-Discrimination and Sexual Harassment Policies

Conducting Effective Investigations
Reference Number: CTAS-1068
In order to avoid liability, the employer must investigate allegations of unlawful harassment in a prompt, thorough and impartial manner. The first thing the employer should do is find out whether the alleged harasser denies the accusation. If not, there is no need for further fact-finding, and all that is left is to determine the appropriate corrective action. If the alleged harasser denies the allegations, then the employer should launch a fact-finding investigation immediately.

Steps in the Investigative Process:

1. Find out if the alleged harasser denies the allegations. If not, determine appropriate corrective action. If so,
2. Conduct fact-finding investigation.
3. If necessary, take measures to ensure that further harassment does not occur, such as making scheduling changes to avoid contact between the parties, transferring the alleged harasser, or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation.
4. Interview witnesses.
5. Examples of questions to ask the complainant:
   Who committed the alleged harassment?
   What exactly occurred?
   When did it occur, and is it still ongoing?
   Where did it occur?
   How often did it occur?
   How did it affect you?
   Has your job been affected in any way?
   How did you react?
   What responses did you make at the time, or afterwards?
   Was anyone present when the incident(s) occurred?
   Who might have relevant information?
   Did you tell anyone?
   Did anyone see you immediately after the incident(s)?
   Has the person harassed anyone else?
   Do you know if anyone has complained?
   Are there any notes, physical evidence or other documentation?
   How would you like to see the situation resolved?
   Do you know of any other relevant information?
6. Examples of questions to ask the alleged harasser:
   What is your response to the allegations?
   (If the harasser claims the allegations are false) Do you know why the complainant might lie?
   Who might have relevant information?
   Are there any notes, physical evidence or other documentation?
   Do you know of any other relevant information?
7. Examples of questions to ask third parties:
   What did you see or hear? When did it occur? Describe the behavior of the alleged harasser.
   What did the complainant tell you? When?
   Do you know of other relevant information?
   Are there other persons who have relevant information?
8. Determine Credibility - factors:
   Inherent Plausibility - Is it believable on its face? Does it make sense?
   Demeanor - Did the person seem to be telling the truth or lying?
   Motive to Falsify - Did the person have reason to lie?
   Corroboration - Is there witness testimony or physical evidence to support the testimony?
   Past Record - Is there a history of similar behavior in the past?
9. Make a determination as to whether harassment occurred. This could be done by the investigator or by management reviewing the investigator’s report. If no
determination can be made because the evidence is inconclusive, the employer should still take further preventative measures, such as training and monitoring.

Immediate and Appropriate Corrective Action

Reference Number: CTAS-1069

The employer must make clear that it will take immediate and appropriate corrective action, including discipline, whenever it finds that harassment has occurred in violation of the employer’s policy. Remedial measures should be designed to:

1. Stop the harassment;
2. Correct the effects of the harassment on the employee; and
3. Ensure the harassment does not recur.

Disciplinary measures should be proportional to the seriousness of the offense. The measures taken do not have to be those that the employee requests, as long as they are effective. Remedial measures should not adversely affect the complainant, and should be designed to put the complainant in the position he or she would have been in had the misconduct not occurred. The employer should follow up to ensure that the remedial measures were effective.

Some examples of measures intended to stop the harassment and ensure that it does not recur include the following:

- Oral or written warning or reprimand
- Transfer or re-assignment
- Demotion
- Reduction in wages
- Suspension
- Discharge
- Training or counseling to ensure the harasser understands why the conduct violated the policy
- Monitoring the harasser to ensure the harassment stops

Some examples of measures intended to correct the effects of the harassment include the following:

- Restoration of leave taken because of the harassment
- Expungement of negative evaluations that arose from harassment
- Re-instatement
- Apology by harasser
- Monitoring to ensure the complainant is not subjected to retaliation because of complaint
- Correction of any other harm that may have occurred (e.g., compensation for losses)

Other Preventive and Corrective Measures

Reference Number: CTAS-1070

In addition to implementing a policy and complaint procedure, the employer must exercise due care to guard against supervisor misconduct. This includes screening, training and monitoring their performance. Due care requires employers to:

1. Instruct supervisors and managers to address or report all complaints of harassment regardless of whether they are designated to take complaints, and regardless of whether the complaint conforms to procedure (e.g., if employee files EEOC charge, management should launch internal investigation regardless of whether the employee filed a complaint under employer's policy).
2. Correct harassment regardless of whether an employee files an internal complaint, if the conduct is clearly unwelcome (e.g., if there is graffiti containing sexual or
1. Racial epithets, management should eliminate it and not wait for an internal complaint.

3. Conduct periodic training for supervisors and managers to ensure that they understand their responsibilities under the policy and complaint procedure.

4. Monitor supervisors’ and managers’ conduct to ensure that they carry out their responsibilities (e.g., include this in formal evaluations).

5. Take reasonable preventive measures, including screening applicants for supervisory jobs to see if they have a record of engaging in harassment.

6. Keep records of all complaints of harassment so that any patterns of harassment by the same individual may be noted.

**Harassment by Non-Employees**

Reference Number: CTAS-2470

Third parties that visit county offices to transact business may also be guilty of workplace harassment, and if this occurs the employer is responsible for taking appropriate action to stop it. The fact that the harasser is not an employee of the county does not relieve the county of liability. When an employer knows or should have known about the existence of a hostile work environment and fails to address it, both the employer and individual managers may be liable.

If less drastic efforts to stop the harassment have failed, the county does have a statutory remedy to seek injunctive relief in court. Under T.C.A. § 50-1-506, the county may, through its attorney, seek an injunction against a person who commits harassment against an employee. The injunction may be sought in any court of competent jurisdiction having the power to grant injunctions. As used in this statute, "harassment" means two or more instances of contact serving no legitimate purpose directed at an employee, in connection with that person’s status as an employee, that a reasonable person would consider alarming, threatening, intimidating, abusive, or emotionally distressing and that does or reasonably could interfere with the performance of the employee's duties. “Instance of contact” means a direct communication or physical touching. T.C.A. § 50-1-502.

**Small Workplaces**

Reference Number: CTAS-1071

For small workforces, the employer may not need to implement the type of formal policy and complaint procedure that a large employer would need. Oral communication of the policy and procedure at staff meetings can be enough, if the mechanism is an effective one. If a complaint is made, the employer must be prompt, thorough, and impartial in its investigation, and swift and appropriate with corrective action.

**EEOC Get the Facts Series: Small Business Information**

**Employee’s Duty to Exercise Reasonable Care**

Reference Number: CTAS-1072

The second part of the employer’s defense requires the employer to show that the aggrieved employee "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher, 118 S.Ct. at 2293, Ellerth, 118 S.Ct. at 2270. If the aggrieved employee could have avoided all of the harm, the employer will not be liable; if only some of the harm could have been avoided, the damages will be reduced accordingly.

Unreasonable failure to complain. This determination depends on the circumstances and information available to the employee at that time. Employees should not be expected to complain immediately after the first or second incident of relatively minor harassment. The employee may tell the harasser directly that he or she wants the harassment to stop, then wait to see if this is effective. If the harassment persists, though, further delay may be found unreasonable.

Other reasons for an employee’s failure to complain may include:

1. The employee had reason to fear retaliation - The employee’s fear of retaliation
must be reasonable. To assure employees that such a fear is unwarranted, the employer must clearly communicate and enforce a policy that no employee will be retaliated against for complaining of harassment.

2. There were obstacles to making complaints - Unnecessary obstacles to complaints might include: undue expense to the employee, inaccessible points of contact for making a complaint, or unnecessarily intimidating or burdensome requirements. An employee's failure to participate in alternate dispute resolution (ADR) does not constitute unreasonable failure to avoid harm; while an employee may be expected to cooperate in the employer's investigation, the employee is not expected to give up legal rights, either procedural or substantive, as an element of exercise of reasonable care, nor can an employee be required to resolve the matter with the harasser.

3. The complaint mechanism was not effective - The employer cannot rely on an employee's failure to complain if the employee's failure is based on a reasonable belief that the process was ineffective (e.g., where the policy requires the employee to report the incident to the harassing supervisor, or where the employee is aware of other instances where co-workers' complaints failed to stop harassment.) One way an employer can help this perception is to release information about corrective and disciplinary actions taken to stop harassment.

Other efforts by employee to avoid harm. The employer cannot use the defense even if the employee unreasonably failed to use the complaint process, if the employee made other efforts to avoid harm. A prompt complaint to the EEOC or Tennessee Human Rights Commission (THRC) while the harassment is ongoing could qualify as such an effort, as could a union grievance. Also, a temporary staffing agency employee could complain of harassment to the staffing firm or to the client, reasonably expecting either to correct the problem. The timing of the complaint is important - if the employee could have avoided damages by complaining sooner, then the damages may be reduced accordingly.

**Drug Testing**

Reference Number: CTAS-172

The employer should take steps to provide a safe workplace for employees, and to act in a reasonable and prudent manner when faced with employees who may be impaired on the job as a result of drug and/or alcohol use. The employer's vigilance is most necessary in those jobs where employees work with dangerous machinery or are otherwise exposed to dangerous conditions. In addition, the employer may be responsible to the public if an impaired employee poses a safety threat to the public, such as drivers of government vehicles.

Many local governments are voluntarily adopting drug-free workplace policies and establishing drug awareness programs and employee assistance programs (EAPs). Policies should be tailored to the needs and interests of each employer.

Unlike the private sector, there are constitutional limitations on the ability of governmental employers to conduct drug testing programs. The only drug testing that is legally mandated for county employees is for those who are required to have a commercial driver license. The requirements for this program are discussed on the page entitled "Federally Mandated Drug Testing."

**Federal Drug Free Workplace Requirements**

Reference Number: CTAS-1073

The Drug Free Workplace Act of 1988 requires local governments that are federal grant recipients or contractors to maintain a drug-free workplace as a condition of receiving funds. The Act requires covered organizations to do the following:

1. Publish and give a policy statement to all covered employees informing them that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the covered workplace and specifying the actions that will be taken against employees who violate the policy.

2. Establish a drug-free awareness program to make employees aware of the dangers
of drug abuse in the workplace; the policy of maintaining a drug-free workplace; any available drug counseling, rehabilitation and employee assistance programs; and the penalties that may be imposed upon employees for drug abuse violations.

3. Notify employees that as a condition of employment on a federal contract or grant, the employee must abide by the terms of the policy statement; and notify the employer, within five calendar days, if he or she is convicted of a criminal drug violation in the workplace.

4. Notify the contracting agency within 10 days after receiving notice that a covered employee has been convicted of a criminal drug violation in the workplace.

5. Impose a penalty on, or require satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is convicted of a reportable workplace drug conviction.

6. Make an ongoing, good faith effort to maintain a drug-free workplace by meeting the requirements of the Act.

The Drug Free Workplace Act of 1988 neither requires nor authorizes a government employer to test its employees for drugs or alcohol. Drug testing is constitutionally permissible for governmental employees only under certain circumstances, and specific policies and procedures must be developed for testing programs. See “Government Employee Drug Testing - the Constitutional Issues” for more information.

State Drug Free Workplace Program (Workers’ Compensation)

Reference Number: CTAS-1074
Tennessee Workers’ compensation laws and regulations have created a voluntary program of drug testing that can result in reduced premiums for Workers’ compensation insurance and denial of Workers’ compensation benefits to impaired workers. T.C.A. § 50-9-101 et seq. This program is optional – employers are not required to participate.

The statutes establishing these drug-free-workplace programs expressly restrict drug testing to constitutional limits. These statutes neither permit nor require an employer to conduct unconstitutional drug tests. Op. Tenn. Att’y Gen. 14-52 (April 24, 2014). Accordingly, the program must be carefully tailored to the needs of the government employer so that the employees’ constitutional rights are not infringed. See "Government Employee Drug Testing—the Constitutional Issues" for more information.

Counties wishing to participate in the state’s drug free workplace program can obtain more information about the state program, or request a drug free workplace program information kit, by contacting:

Drug Free Workplace Program
220 French Landing Drive
Nashville, TN 37243-1002
(844) 224-5818

Or visit the state's Drug Free Workplace Program website.

Federally Mandated Drug Testing

Reference Number: CTAS-1075
Federal regulations found at 49 C.F.R. Part 40, require drug and alcohol testing for persons who are required by law to have a commercial driver’s license (CDL) in connection with their employment. These regulations are administered by the United States Department of Transportation through the Federal Highway Administration. Although the regulations originally applied only to interstate truck drivers, they were amended in 1994 to include state and local government employees. These are the only county employees who are required by law to be drug tested.

The employees who must be tested are those who drive:
1. Vehicles over 26,000 pounds GVWR;
2. Trailers over 10,000 pounds GVWR if the gross combination weight rating is more than 26,000 pounds;
3. Vehicles designed to carry 16 or more passengers (including the driver); and
4. Any size vehicle used to transport hazardous materials (required to have a placard).

The definition of “driver” under the regulations includes regular employees of the county, as well as part-time and occasional drivers, leased drivers and independent contractors. Drivers of emergency vehicles are exempt. The only other exemptions are farmers, military personnel, recreational vehicles and vehicles leased to transport personal possessions for non-business purposes (rental household moving vans).

There are six types of testing that must be performed. Those are:

1. Pre-employment testing – job offers to CDL drivers must be conditioned on the results of the test; also transfers to CDL driver positions;
2. Random testing – unannounced testing on a random basis (the required rates of random testing are determined by the Federal Motor Carrier Safety Administration);
3. Reasonable suspicion testing – supervisors must receive training on what constitutes reasonable suspicion - at least one hour each for drugs and alcohol;
4. Post-Accident Testing – after any accident involving loss of human life, or when the driver receives a citation for a moving traffic violation arising from the accident;
5. Return-to-Duty Testing – for employees who have failed a previous test or who have otherwise engaged in prohibited conduct and are being returned to a safety-sensitive position after having been through counseling and evaluation;
6. Follow-up testing – unannounced testing (at least six in the first 12 months) after a driver has been returned to a safety-sensitive position.

Prior to beginning the testing program, there must be written policies and procedures in place, and drivers must be given educational materials explaining the requirements of the drug and alcohol testing regulations and your policies and procedures. These materials must be given to the drivers before the testing program begins. So that supervisors will be able to recognize when reasonable suspicion testing is appropriate, each supervisor must complete one hour of training on reasonable suspicion for drugs and one hour of training for reasonable suspicion of alcohol each year.

Testing for controlled substances (drugs) is done by urine test. All urine samples are analyzed for five drugs:

1. Marijuana
2. Cocaine
3. Amphetamines
4. Opiates (including heroin)
5. PCP

Split sample testing is required for all drug testing. This means that each urine sample is divided into two parts. If the first sample tests positive, the other portion of the sample can be tested to confirm the results. The analysis must be done by a laboratory that is certified by the U.S. Department of Health and Human Services.

Testing for alcohol is done by breath test. An approved evidential breath testing (EBT) device must be used, and the test must be performed by a breath alcohol technician (BAT). Two breath tests are required for a positive result. If the first test is below 0.02, it is considered negative. If it is 0.02 or greater, a second test must be performed. A result of 0.04 or higher constitutes a positive result. The confirmation test must be done on a machine that prints out the results, date and time.

Employers are required to keep detailed records of all aspects of the testing program, and these records must be kept for specified periods of time. Test results and records must be kept
confidential. The records cannot be released to others without the consent of the driver.

This is an overview of the requirements of the federal regulations. Additional information may be found on the Federal Motor Carrier Safety Administration and U.S. Department of Transportation’s drug and alcohol testing website.

It is important to keep in mind that when a government employer tests its employees for drugs and alcohol, it constitutes a “search” within the meaning of the 4th Amendment to the United States Constitution. The Supreme Court has held that this kind of testing is permissible only when the testing is done in accordance with established rules and procedures and when the testing is done in the proper manner by qualified personnel. Otherwise, an employee’s constitutional rights may be violated. See "Governmental Employee Drug Testing-The Constitutional Issues" for more information.

There are many companies that can be retained to handle drug testing programs. This is the best course of action in most cases, since many counties may not have the personnel available to implement the testing program properly. Be aware, though, that contracting with someone else will not relieve the county of liability. The county employer must be careful in selecting the company to handle the testing program and should find a company that has worked with governmental employers and understands the constitutional issues that apply. Make sure that it has the proper knowledge and expertise, and that certified professionals are used. Be sure the company has adequate liability insurance and that the contract contains provisions to indemnify the county against any liability or other losses in the event that the testing is not done properly and in accordance with all applicable statutes and regulations. Make sure the county attorney reviews any contract before it is signed.

Before choosing a company to handle a testing program, the county should obtain proposals from several companies and compare services and price. Look for a company that can handle all aspects of the testing program, including assistance in developing policies and procedures, selection of names for random testing, collection of samples, laboratory testing, training of supervisors and other personnel, recordkeeping and all other requirements for the federally-mandated testing program.

Governmental Employee Drug Testing - The Constitutional Issues

Reference Number: CTAS-1076

Drug testing of employees in the private sector has become quite common. Local governments also have become interested in testing of employees to detect drug and/or alcohol use. Unlike employers in the private sector, however, governmental employers are limited by constitutional considerations. It is well settled that drug testing by government employers constitutes a “search” under the Fourth Amendment to the United States Constitution. Probable cause and a warrant are generally required for government searches, although the Supreme Court has carved out exceptions.[1] Even in those instances where testing is permitted under the Fourth Amendment, the due process clause and the equal protection clause of the Constitution prohibit certain practices and procedures in connection with the testing of employees. Local government employers can be held liable for monetary damages when an employee’s constitutional rights have been violated as a result of drug testing.[2]

The first cases decided by the United States Supreme Court involving employee drug testing were National Treasury Employees Union v. Von Raab, 109 S.Ct. 1384 (1989), and Skinner v. Railway Labor Executives’ Association, 109 S.Ct. 1402 (1989). The Court adopted a balancing test to determine whether drug testing of government employees is constitutionally permissible, finding that the governmental interests in testing must be balanced against the employee’s liberty and privacy interests to determine whether a warrant, probable cause or individualized suspicion is required in the particular context. Unless there are “special needs beyond the normal need for law enforcement” which are sufficiently compelling to overcome the individual’s privacy interests, a warrant and probable cause are required. The Supreme Court found testing without a warrant permissible in three instances: (1) customs officers involved in front-line drug interdiction; (2) customs officers who carry firearms; and (3) train operators where a documented problem with drug/alcohol related accidents existed in the industry. The Court found that employees in these
positions performed duties "fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." Since these decisions, lower courts have struggled with the limits of the Court’s rulings. Some courts have interpreted the rulings more broadly than others.

The Supreme Court again addressed the issue in 1997 in Chandler v. Miller when the Court was asked to decide the constitutionality of a Georgia statute requiring candidates for state office to pass a drug test. The Court found that candidates for public office are not "safety sensitive" and cannot constitutionally be subjected to drug testing. In reaching this conclusion the Court reviewed the applicable law, noting that to be reasonable under the Fourth Amendment a search ordinarily must be based on individualized suspicion, but exceptions are sometimes warranted based on concerns other than law enforcement and in these special circumstances, courts must make a context-specific inquiry to determine whether individual privacy interests are outweighed by a sufficiently important governmental interest. In this case the Court found that Georgia showed no "special need" for the testing, so even though the method was found to have been relatively non-intrusive the testing was nonetheless unconstitutional. The Court held that "the preferred special need for drug testing must be substantial – important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion." The state argued that the testing was justified because unlawful drug use is incompatible with public office and calls into question the official’s judgment and integrity, it jeopardizes the discharge of public functions including anti-drug law enforcement, and it undermines public confidence and trust in elected officials. However, the Court found that the state showed no "concrete danger demanding departure from the Fourth Amendment’s main rule."

The first question in the analysis is whether there is a valid public interest to be protected by drug testing. A generalized desire to eliminate drug and/or alcohol use among employees is not enough; the employer must have a "compelling interest" to be protected. In Chandler, the Court made it clear that much more than a desire to show a symbolic commitment to the struggle against drug abuse is required to substantiate drug testing program. In the Von Raab case, including the fact that in Von Raab there was a demonstrated problem with bribery by drug smugglers and the employees worked in a situation where it was not feasible to subject them and their work product to "the kind of day-to-day scrutiny that is the norm in more traditional office environments."

If a local government employer wants to implement some form of drug and/or alcohol testing, it must first be determined who is to be tested and why it is necessary to test each particular group. Is there a documented drug or alcohol problem in the particular workforce? Is the group performing duties that are "fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences" similar to train operators, nuclear power plant operators, and customs agents who are directly involved in drug interdiction and who carry firearms? A compelling interest must be identified, other than the need for law enforcement, to justify the testing.

Once it has been determined that there exist sufficiently compelling "special needs" to ensure that
a particular group of employees are not using drugs or alcohol, it should be determined whether there are other, less intrusive means to accomplish the objective. For example, would proper supervision of employees identify a drug or alcohol problem, or is the risk involved so great that more extreme measures must be taken? Is supervision of the particular group impractical, as in long-haul truck drivers who perform their jobs alone for long periods of time without supervision?

If testing is determined to be the only effective means under the circumstances, the appropriate testing program must be considered. Several options or combinations of testing methods are generally employed: (1) job applicants, (2) employees who are reasonably suspected to be impaired as a result of drug or alcohol use, (3) all employees on a random or periodic (including annual physicals and return-to-work testing) basis, and/or (4) employees involved in an accident or other incident related to public safety. The testing program must be reasonably related to the special governmental needs to be served, with all of the circumstances being considered.

With regard to job applicants, courts have routinely held that government employers may require successful completion of a drug screening as a condition of employment in or promotion to a safety sensitive position. In addition, it has been held that drug screening of an applicant is less intrusive where the applicant is already required to undergo a physical examination requiring a blood or urine sample. However, wholesale testing of applicants for government employment without regard to the nature of the position has not been upheld in any court in this jurisdiction, and the Tennessee Attorney General is of the opinion that the practice is unconstitutional.

A federal district court struck down as unconstitutional a Georgia statute requiring routine testing of all applicants for state employment. Accordingly, routine pre-employment testing should be used only for applicants who will occupy sensitive positions. Applicants should be informed in advance of the testing requirement, and testing should be limited to those who have been tentatively selected for the position.

The United States Supreme Court has never approved any kind of testing for employees in non-sensitive positions, including suspicion-based testing. However, reasonable suspicion testing is widely believed to be justified for all government employees, and the Tennessee Attorney General appears to be of the opinion that such testing is permissible regardless of the sensitive nature of the position. Until the issue has been settled, it may be unwise to test any employees in non-sensitive positions. Even for employees in sensitive positions, the inquiry does not end here. There must be a reasonable, individualized suspicion of on-duty drug use or impairment. Uncorroborated tips and “hunches” are not enough. In addition, courts have routinely held that suspicion of off-duty drug or alcohol use will not justify testing unless it results in on-the-job impairment. For example, a district court in Tennessee found that an employer’s concerns that off-duty drug use could impair performance on-site were legitimate for employees at the Oak Ridge nuclear weapons plant where the potential harm to society that could be caused by an impaired employee was “irretrievable” and “catastrophic.” A statement quoted by the Tennessee Attorney General is instructive on this point: “The state, as employer, simply has no business trying to ferret out private misconduct that does not affect job performance.”

Random testing is the most problematic of all the testing methods, and courts have been reluctant to allow random testing except in situations where the potential for harm to the public as a result of employee impairment is particularly compelling. Courts have been reluctant to subject the average public employee who has given no indication of wrongdoing to a procedure so offensive as being compelled to produce bodily fluids for examination by his or her employer. Random testing has been upheld by the Supreme Court for customs agents involved in front-line drug interdiction and those who carry firearms, and customs agents who are entrusted with truly sensitive classified information affecting national security. Federal district courts in Tennessee and the Sixth Circuit Court of Appeals have allowed random testing of firefighters, policemen who carry firearms and workers at nuclear weapons plants. Other courts have allowed random testing only in positions that have been determined to involve compelling public safety concerns. The courts are by no means uniform in their determination of what constitutes a sufficient public safety concern to justify random testing, and the law is rapidly developing as new cases are decided and old ones overturned. The Tennessee Attorney General has issued an opinion that random testing is unconstitutional unless the position involves public safety, and an opinion that blanket random
testing of all county employees and elected officials would not pass constitutional muster.\[22\] Although the Tennessee Supreme Court has not made any determination on this issue, the Massachusetts Supreme Court has determined that random drug testing, even of police and firefighters, is unconstitutional under the Massachusetts constitution.\[23\]

Post-accident testing was allowed by the Supreme Court in *Skinner* for railroad employees who were directly involved in an accident. The testing must be limited to those employees who actually could have caused the accident. Lower courts, including the Sixth Circuit, have allowed post-accident testing of mass transit drivers.\[24\] Written policies and procedures must be in effect and the information disseminated to the employees.

Even where testing is justified at its inception, it also must be reasonable in its implementation. The testing must be pursuant to established policy and not subject to the discretion of officers in the field. "An essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents."\[25\] When the warrant and probable cause requirements are removed, other safeguards are necessary to replace them. Both the circumstances justifying the testing and the permissible limits of the intrusion must be defined narrowly and specifically, and the policies and procedures must be known to employees who are subject to testing. All reasonable measures must be taken to protect the employee’s privacy rights. The employees should be informed in advance of the times they will be tested. The tests must be performed by qualified personnel and care must be taken to ensure the accuracy of the test results. The act of production of the sample should not be observed unless there is reason to believe that the sample will be adulterated. The test results must be kept confidential. If the test results are positive, another test must be administered to confirm the positive result and the employee must be given an opportunity to offer reasonable explanation.

Must the employer have a policy in place before testing an employee based on reasonable suspicion? Federal agencies effectively cannot test their employees until a policy and comprehensive standards and procedures are in place.\[26\] A written policy and procedures for testing should be established prior to testing any employees, and it is not recommended that testing of any kind be employed prior to the implementation of policies and procedures. However, under exigent circumstances, such as where the position involves extremely dangerous activities with vital public safety interests at stake and the employer has reliable evidence of an employee’s on-the-job impairment, courts might be more likely to allow suspicion-based testing in the absence of written policies and procedures.\[27\] However, the need for such testing should be very rare.

Although local governments are not required to use federal guidelines (unless a federal grant is involved), the U.S. Department of Health and Human Services (HHS) has issued mandatory guidelines for testing federal employees that may be used as an example for developing a testing program. Also, the National Institute on Drug Abuse (NIDA) has developed a comprehensive drug-free workplace program that includes testing. A program modeled after the federal guidelines and NIDA’s model program would likely withstand constitutional challenge. Under the HHS guidelines, federal agencies are required to use laboratory facilities that have been certified by the federal government. The guidelines set out the criteria for certification of a facility. Any testing facility that an employer plans to use should be on the federal list of certified facilities, or an independent investigation of the facility should be made to determine whether it meets the federal criteria. The use of testing facilities that do not employ reliable methods and follow proper procedures may cause a program to be unconstitutional.

The employer should thoroughly investigate the alternative testing methods available, to determine accuracy and reliability as well as the ability to detect on-the-job impairment. For example, using a breath test for alcohol or a saliva test for marijuana may be more effective in limiting the search to on-the-job use and may make the testing more reasonably related to its objective. The federal guidelines and NIDA model contain specifications for testing methods. The list of substances that will be included in the testing also must be determined. The testing should be limited to substances that are believed to be prevalent in the general population, and should not include substances that are not believed to affect job performance.\[28\] Local law enforcement officials or the county health department may be of assistance in this regard.
The "special needs" exception to the warrant requirement includes warrantless searches of buildings by health and safety inspectors and other administrative searches. This "special needs" exception appears to be the basis for allowing drug testing of government employees, although arguably the administrative search exception was intended only for searches of places and things, and was never intended to extend to intrusive bodily searches. The cases dealing with warrantless searches of persons generally involve law enforcement action and have required exigent circumstances and individualized suspicion. Drug testing of government employees falls somewhere between these two types of searches. An analysis of the development of the exceptions to the warrant requirement is beyond the scope of this publication. For additional information, see Schulhofer, *On the Fourth Amendment Rights of the Law Abiding Public*, 1989 Sup.Ct Rev. 87; Note, *Governmental Drug Testing: A Question of Reasonableness*, 43 Vand. L. Rev. 1343 (1990).

See, e.g., *Johnson v. City of Plainfield*, 731 F. Supp. 689 (D. N.J. 1990) (city held liable for monetary damages under § 1983 because it awakened police officers and firefighters while at work for unannounced mass urinalysis, observed by testing agents; those who tested positive were immediately terminated; the city had no written policy); *Capua v. City of Plainfield*, 643 F. Supp 1507 (D. N.J. 1986) (city’s testing violated employees’ 14th Amendment right to due process: no prior notice, failure to promulgate standards, failure to protect confidentiality, failure to provide copies of results, and failure to provide pre-termination hearing).


The Supreme Court also determined that the government had a compelling interest in safeguarding truly sensitive government secrets which are vital to national security, and that employees who handle such information may be tested. However, it is doubtful that there exists in local government any "classified" information which could be considered vital to national safety and security.

See *Skinner*, at 1419 (railroad operators "can cause great human loss before any signs of impairment become noticeable to supervisors or others").

See *Knox Co. Education Ass’n. v. Knox Co. Board of Education*, 158 F.3d 361 (6th Cir. 1998); see also, *Friedenberg v. School Board of Palm Beach County*, 911 F.3d 1084 (11th Cir. 2018).

*See City of Annapolis v. United Food and Commercial Workers Union Local 400, 565 A.2d 672 (Md. 1989)* (police and firefighters required to submit to periodic drug tests as part of annual physical).


The ADA prevents employers (42 U.S.C. §12112(c)(2)(A)), and the Rehabilitation Act prevents recipients of federal funds (28 C.F.R. § 41.55), from administering physical examinations to an applicant before a job offer has been made. Although the ADA expressly provides that a drug screening for the illegal use of drugs does not constitute a “physical examination” under the ADA (42 U.S.C. § 12114(d)(1)), testing for anything other than illegal drug use (e.g., prescription drugs) would be governed by the ADA. The safest practice would be to require testing only after the offer has been made, with employment being conditioned upon the test results.

Conversely, the Supreme Court has never invalidated suspicion-based employee drug testing. See also *Relford v. Lexington-Lafayette Urban County Government*, 390 F.3d 452, 2004 WL 2674289 (6th Cir. 2004).
For employees such as law enforcement officers who are directly involved in drug enforcement activities, off-duty use of illegal drugs may be sufficiently related to job performance to justify testing. See Von Raab, at 1395.

See also National Federation of Federal Employees v. Cheney, 742 F. Supp. 4 (D.D.C. 1990) (government had no interest in off-duty drug use unless it resulted in on-duty impairment).

Ensor v. Rust Engineering, 704 F. Supp. 808 (E.D. Tenn. 1989) (upheld random urinalysis at Oak Ridge nuclear weapons plant under comprehensive written policy); Penny v. Kennedy; Lovvorn v. City of Chattanooga, 915 F.2d 1065 (6th Cir. 1990) (vacated prior holdings in companion cases to allow mandatory drug testing of police and firefighters after Von Raab and Skinner, but remanded for further consideration of whether testing program was carried out in a reasonable manner under proper standards).


Skinner, at 1415.

Tests that reveal prescription drugs taken for a condition that constitutes a disability under the Americans with Disabilities Act (ADA) may raise questions under the ADA, and if the drug tests reveal anything other than current illegal drug use, the results must be kept confidential in accordance with the requirements of the ADA.

Fair Labor Standards Act (FLSA)

The federal Fair Labor Standards Act (FLSA) sets basic minimum wage and overtime pay standards, establishes recordkeeping requirements and regulates child labor. The FLSA has applied to state and local governments since 1985 when the United States Supreme Court decided the case of Garcia v. San Antonio Metropolitan Transit Authority, which reversed its 1976 decision in National League of Cities v. Usery and held that the FLSA applies to employees of state and local governments.

As a result of Garcia, Congress enacted amendments to the FLSA which authorized the use of compensatory time in lieu of cash compensation for overtime work by state and local government employees. In addition, the amendments provided an exemption from the overtime and minimum wage requirements of the FLSA for volunteers under specified circumstances; authorized special detail work by public safety employees without overtime costs for the county; and defined limited circumstances under which government employees can do part-time work for the county in their off-duty hours without the county incurring overtime costs for the additional hours.
The U.S. Department of Labor (DOL) promulgates rules and regulations to implement the provisions of the FLSA, which can be found in the Code of Federal Regulations (C.F.R.). The regulations contain detailed explanations of how the various provisions of the FLSA are applied, and often include examples to aid in interpreting the law. Copies of these regulations, as well as other useful publications, are available from the local DOL offices located across the state.

All local governments should periodically undertake a review of their employment practices to ensure that they are in conformity with the requirements of the FLSA and any new rules enacted by any recent amendments. Local governments should conduct job studies (reviewing job duties), write accurate job descriptions, assign properly descriptive job titles and perform periodic audits or reviews to consider exemptions applicable and continued compliance with the FLSA’s provisions.

Almost as important as what the FLSA does, is what it does not do. The FLSA does not require any of the following:

1. Vacation, holiday, severance, or sick pay;
2. Employees be paid on a salary basis or hourly wage basis for non-overtime work;
3. Meal or rest periods, holidays off, or vacations;
4. Premium pay for weekend or holiday work;
5. Payroll on a weekly basis;
6. Pay raises or fringe benefits;
7. Discharge notice, reason for discharge, or immediate payment of final wages; or
8. Any limit on the number of hours of work for persons 16 years of age and over.

These and similar matters are left to the discretion of the employer. Which official within the county is legally authorized to make personnel decisions is an important consideration. Both general law and private acts should be consulted to determine the applicable law in a particular county and office.

[1] The federal Equal Pay Act of 1963, which requires equal pay for equal work regardless of gender, was enacted as an amendment to the Fair Labor Standards Act. It is more commonly associated with discrimination laws and not with wage and hour laws, and it is administered by the federal Equal Employment Opportunity Commission.


Application of the FLSA

Reference Number: CTAS-130

The FLSA is applicable to all employees of counties, including full and part-time employees, unless they are specifically exempted. Under the FLSA, some workers are considered not covered, and thus are not subject to any of the provisions of the FLSA, and others are exempt from some of the provisions of the FLSA. The payment of a salary in lieu of an hourly wage does not, by itself, remove an employee from the provisions of the FLSA.

The FLSA does not apply to persons who are not “employees.” The determination of whether an employer-employee relationship exists is therefore an important one. The employment relationship requires an “employer” and an “employee,” and the act or condition of employment. Courts have interpreted the term “employ” as defined in the FLSA broadly as “to suffer or permit to work” and have indicated that mere knowledge by an employer of work done for him or her by another is sufficient to create an employment relationship under the FLSA.

Non-Covered Workers

Reference Number: CTAS-131

The following workers are not included within the definition of “employee” for purposes of the FLSA, and thus are not covered by the Act:

1. Independent contractors;
2. Elected officials and their personal staff, policy-making political appointees, and
Independent Contractors

Reference Number: CTAS-132

Independent contractors are not covered by the FLSA. There is no simple method for determining whether a worker is an employee or an independent contractor. A determination of the relationship cannot be based on isolated factors or upon a single characteristic or on technical concepts. It depends on all of the circumstances of the whole activity. All the facts relevant to the relationship between the worker and the employer must be considered. In general, workers who are economically dependent on the business of the employer, regardless of their skill level, are employees. Independent contractors are workers with economic independence who are in business for themselves. Among the factors that are considered significant, although no single one is regarded as controlling, are:

1. The extent to which the services in question are an integral part of the employer’s business.
2. Whether the worker’s managerial skills affect his or her opportunity for profit and loss.
3. The relative investments in facilities and equipment by the worker and the employer.
4. The worker’s skill and initiative.
5. The permanency of the worker’s relationship with the employer.
6. The nature and degree of control by the employer.

Each of the above-listed factors should be carefully analyzed, as well as any other relevant factors, to determine whether a person is an independent contractor based on the totality of the circumstances.

There are some factors that the Department of Labor deems immaterial to the determination of whether an employment relationship exists. The fact that the worker signs an agreement stating that he or she is an independent contractor is not controlling. The fact that the worker has incorporated a business or is licensed by a governmental agency is also not determinative. These include the place where the work is performed, the absence of a formal employment agreement, and whether the alleged contractor is licensed by state/local government. Finally, the time or method of payment does not control the determination. For more information, see FLSA Fact Sheet #13, Am I an Employee? Employment Relationship under the Fair Labor Standards Act.

Elected Officials and Their Personal Staff

Reference Number: CTAS-133

Elected county officials are not covered by the FLSA. Also not covered are political appointees to policymaking positions, legal advisors, and the personal staff of elected officials, as long as these persons are not under civil service protection. The exclusions for an elected official’s personal staff and political appointees are very narrowly applied, and great care should be exercised in relying on those exclusions.

To determine whether someone meets one of these exclusions, the definition of “employee” under the FLSA must be examined, together with the administrative interpretations of that definition. The definition of “employee” does not include an individual who:

1. Holds a public elective office of that state, political subdivision, or agency;
2. Is selected by the holder of such an office to be a member of the official’s personal staff;
3. Is appointed by the office holder to serve on a policymaking level;
4. Is an immediate adviser to such an office holder with respect to the constitutional
or legal powers of the office; or

5. Is an employee of the legislative branch of that state, political subdivision, or agency;

as long as such individuals are not subject to civil service laws of the state, political subdivision, or interstate governmental agency which employs them.[1]

The exclusion for personal staff of an elected official is construed very narrowly by the DOL. As explained by the DOL in a Wage and Hour Opinion Letter dated November 27, 1998 (1998 WL 1147737), the exception applies only to individuals who are in a “highly intimate and sensitive position of responsibility” on the staff of the elected official. It generally includes only persons who are hired by and under the direct supervision of the elected official and who have regular direct contact with the official. See Wage and Hour Opinion Letter, September 12, 1997 (1997 WL 971910).

When a publicly elected official appoints an individual to serve on a policymaking board or commission, such an appointed individual is not covered by the FLSA. The most obvious examples of these policymaking appointees are appointed members of planning and zoning commissions, recreation boards, or other boards and commissions that have specific policymaking or advisory responsibilities.


Volunteers

Reference Number: CTAS-134

Individuals performing volunteer services for units of state and local governments are not considered "employees" under the FLSA, and are therefore not covered by the act. The regulations governing volunteers are found in 29 C.F.R. §§ 553.100 - 553.106. A volunteer is an individual who performs a service for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation. These services must be offered freely and without pressure or coercion, direct or implied, from the employer. Individuals performing volunteer services for counties will not be regarded as employees for purposes of the FLSA. However, an employee cannot volunteer to perform services for his or her own employer that are similar to the services the employee is paid to do. For example, a full-time paid firefighter could not agree to identify a portion of the workweek as "volunteer time." An employee cannot be both a paid employee and a non-paid volunteer while performing the same type of work for the same employer.

For county employees who want to volunteer their time, two determinations must be made: (1) whether the services are performed for the same employer, and (2) whether the services are the same or similar to those the employee is paid by the county to do. Whether two units of a county are considered the same employer (same public agency) depends on the facts and circumstances, determined on a case-by-case basis. One factor the DOL considers is whether the agencies or departments are treated separately for statistical purposes in the Census of Governments, issued by the Bureau of the Census, U. S. Department of Commerce. The DOL normally takes an expansive view of the county as an employer, and if the agency for which a county employee wishes to volunteer is even remotely related to the county government, it might be wise to seek an opinion from the Wage and Hour Division on the issue.[1]

If the volunteer services are being performed for the same public employer, the services cannot be the same or similar services that the employee is paid to perform. The same or similar services means similar or identical services, based on all of the facts and circumstances. The DOL will consider such things as the three-digit categories of occupations in the Dictionary of Occupational Titles, as well as whether the volunteer duties are closely related to either the actual duties performed or the responsibilities assigned to the employee.

The DOL has issued several opinion letters on these issues. In an opinion dated October 5, 1987, the DOL stated that fire truck drivers in the same district could not work additional time for the
same district without the hours worked being counted and compensated in accordance with the FLSA. In a ruling dated January 2, 1988, the DOL stated that a firefighter could volunteer the same services for a different public agency in another jurisdiction. In Opinion FLSA2008-11NA dated September 22, 2008, the DOL found that detention officers cannot volunteer for the same public agency as sheriff deputies.

The DOL also has issued opinions confirming that public employees can perform volunteer work for the same employer, as long as the volunteer work is substantially different from their paid position. For example, in a letter dated May 7, 1986, the Wage and Hour Division stated that a full-time paid high school custodian could volunteer services to the high school as an assistant basketball coach. See also Purdham v. Fairfax County School Board, 637 F.3d 421 (4th Cir. 2011) (the court held that where a public employee engages in services different from those he or she is normally employed to perform, and receives no compensation or only a nominal fee, such work is exempt from the FLSA and the public employee is deemed a volunteer). Because all of these issues are decided on the facts and circumstances of the particular case, any county wishing to rely on such opinions would be well advised to request an opinion letter based on its own facts and circumstances.

Volunteers can be reimbursed for expenses, reasonable benefits, and nominal fees without losing their volunteer status. The DOL's regulations do not include any dollar limitation on the amount of money that can be paid to volunteers. The regulations state that a fee will not be considered nominal if it is tied to "productivity." The regulations make clear, however, that fees may be paid on a per-call or similar basis (e.g., a point system). The determination of whether an individual should lose volunteer status and be considered an employee for purposes of the FLSA will be made by DOL on the basis of an examination of the total amount of payments made, including fees, benefits, and expenses, "in the context of the economic realities of the total situation." Examples of allowable payments include uniform allowances, reasonable cleaning expense reimbursement, and compensation for wear and tear on personal clothing. These must be limited to actual reimbursement amounts and cannot be artificially high. Reasonable payments are permitted for tuition, books, supplies, transportation, and meal costs involved in training a volunteer to teach them to perform efficiently the services they will provide as a volunteer.

Some reasonable benefits also may be provided, such as liability, health, life, disability, worker's compensation, a nominal monthly or annual stipend or a "per call" stipend so long as these are nominal in the context of the economic realities of the particular situation. The regulations define allowable "reasonable benefits" to include a wide range of benefits such as pensions and length of service awards, and eliminate the requirements that benefits be "service-related" and be provided to county employees who perform the same type of services as the volunteers in order to qualify as allowable reasonable benefits.

In an opinion letter dated November 9, 1986, the DOL addressed the "reasonable benefits" issue in the context of volunteer firefighters. In this particular instance, the locality proposed to reward its firefighters with the following benefits:

1. Minimum water and sewer allotments—valued at $9.00 and $5.50 per month, respectively;
2. Membership in the government’s swimming pool—valued at $20 per month for a single person and $30 per month for a family, for the pool season of three months; and
3. A contribution to a retirement investment fund—valued at $250 per year, with an increase of $25 per year up to $500.

In this case, the DOL ruled that the benefits offered were nominal in value and therefore would not affect the volunteer status of the firefighters.

[1] One issue that has been fairly controversial is whether a county employee such as an EMT or paramedic can volunteer the same services to a volunteer rescue squad or volunteer fire department within the county. The DOL appears to have relaxed its views somewhat in this area in light of a case in another jurisdiction, Benshoff v. Virginia Beach, 180 F.3d 136 (4th Cir. 1999). If the employee volunteers freely and without coercion, and if the volunteer organization is independently chartered with separate by-laws and policies and it is sufficiently separate from the county, the

Prisoners
Reference Number: CTAS-135
Prisoners who are required to work by or for the government are not considered employees under the FLSA and need not be paid minimum wages or overtime. Use of inmate labor does not violate the FLSA if the prisoner works for or is required to work by the government having custody of the prisoner. However, if the inmates are contracted out to a private contractor, this can create an employment relationship requiring the payment of wages in accordance with the FLSA if the private contractor exercises sufficient control over the prisoner to give rise to an employer-employee relationship. Even where minimum wage is required, deductions for restitution or other matters set by law or court order may reduce the wages below minimum wage so long as the employer does not gain from the deduction.

Exempt Employees
Reference Number: CTAS-136
In addition to the workers who are not covered by the FLSA, there are some employees who are exempt from the minimum wage and overtime provisions of the Act. These employees are not required to be paid overtime when they work in excess of 40 hours in a workweek. These employees are, however, subject to some of the recordkeeping provisions of the FLSA. Although payment of a salary is an essential element of many exemptions, the fact that an employee is paid a salary does not by itself make an employee exempt.

Executive, Administrative and Professional Exemptions
Reference Number: CTAS-137
These exemptions are sometimes called the “white collar” or “Section 541” exemptions, and are governed by the federal regulations found at 29 C.F.R. part 541. These regulations contain detailed requirements for the application of the exemptions. Employers should thoroughly review all of their wage and hour practices and make adjustments to ensure compliance with the rules.

The employer has the burden of proving that a particular exemption applies to a particular employee and, therefore, the employer takes the exemption at his or her peril. Also, even though executive, administrative, and professional employees are specifically excluded from the provisions of the FLSA with regard to minimum wage and overtime, these employees are not exempt from the equal pay provisions and some of the recordkeeping provisions.

In order to qualify for one of these exemptions, an employee must meet certain tests regarding minimum compensation, job duties and responsibilities, and the employee must be paid on a “salary basis.” Under the old regulations, each of the white collar exemptions had a “Short Test” and a “Long Test” but these tests have been combined into a single test for each exemption. All of the white-collar exemptions require employees to be paid on a “salary basis” and their “primary duty” must be the performance of exempt work that varies by exemption. An employee who satisfies the test for a white-collar exemption is exempt from the minimum wage and overtime requirements of the FLSA.

The Salary Basis Requirement
Reference Number: CTAS-138
The “salary basis” test is a threshold requirement for the executive, administrative, and professional exemptions. To meet this requirement, an employee must receive each pay period on a weekly or less frequent basis a pre-determined amount that is not subject to reduction for the quality or quantity of work performed. The regulations were revised effective January 1, 2020. Under current regulations, the amount of the guaranteed salary cannot be less than $684 per week (which translates into $35,568 per year). The employee must receive the full salary for any
week in which any work is performed, without regard to the number of days or hours worked, but exempt employees are not required to be paid for any week in which no work was performed.\[2\]

The $684 minimum weekly salary may be translated into an equivalent amount for periods longer than one week (for example, the $684-per-week requirement will be met if the employee is compensated biweekly on a salary basis of not less than $1,368, semimonthly on a salary basis of not less than $1,482, or monthly on a salary basis of not less than $2,964). However, the shortest period of payment that will meet this compensation requirement is one week.\[3\]

Also, the $684 minimum weekly salary is not dependent on the number of hours worked in the workweek. Part-time employees are subject to the $684 minimum weekly salary in the same way full-time employees are. It cannot be pro-rated to account for the reduced number of hours worked by part-time employees. See Wage-Hour Opinion Letter FLSA2008-1NA (2008 WL 1847289), Feb. 14, 2008.

The regulations contain exceptions that allow deductions from an exempt employee’s pay for the following limited reasons: (1) deductions for absences of one or more full days for personal reasons other than sickness or disability (for example, if an employee is absent for one and one-half days for personal reasons, an employer could only deduct one day; however, the regulations contain a special provision that allows public employers to make deductions for absences of less than one day); (2) deductions for absences of one or more full days for sickness or disability if the employer has a paid sick/disability leave plan in place and the employee has used up his or her paid sick or disability leave (a special provision allows public employers to make deductions for absences of less than one day); (3) deductions to offset any amounts the employee may receive as jury fees, witness fees, or military pay while an employee is on leave for one of these reasons (the employer cannot make deductions for the actual absences for jury duty, witness duty, or temporary military leave; only the pay may be offset); (4) deductions made in good faith for violations of safety rules of major significance (such as rules prohibiting smoking in explosive plants, oil refineries or coal mines); (5) employers may make deductions for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules that are part of written policies applicable to all employees (for example, suspension for violating a written policy prohibiting sexual harassment or workplace violence); (6) the employer is not required to pay full compensation for the first or last week of employment but instead may pay a proportionate part of the employee’s salary for the time actually worked during those weeks; and (7) an employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act (FMLA), but instead may pay a proportionate share of the salary for the time actually worked. When calculating the amount of the deductions, the employer may use the hourly or daily equivalent of the employee’s full weekly salary or any other amount proportional to the time actually missed. A deduction for major safety violations may be made in any amount.\[4\]

Because the strict salary basis test presented problems for employers in the public sector with regard to deductions for less than one day’s absence due to the generally accepted principle that public sector employees should not be paid for time not worked or covered by leave, the DOL issued regulations addressing this issue. The regulations\[5\] state:

- An employee of a public agency who otherwise meets the salary basis requirements of § 541.602 shall not be disqualified from exemption under § 541.100, 541.200, 541.300, or 541.400 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee’s pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because:
  1. permission for use has not been sought or has been sought and denied;
  2. accrued leave has been exhausted; or
  3. the employee chooses to use leave without pay.

- Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary
basis except in the workweek in which the furlough occurs and for which the employee’s pay is accordingly reduced.

Under these regulations, a public employee who otherwise meets the requirements for an executive, administrative, or professional exemption does not lose the exemption if the employee is paid according to a pay system under which the employee accrues personal leave and sick leave and, absent the use of such accrued leave, the pay system requires the employee’s pay to be reduced for absences for personal reasons or because of illness or injury of less than one work day. These regulations also allow a public employer to place an exempt employee on furlough for budget-required reasons without disqualifying the employee from being paid on a salary basis, except in the workweek in which the furlough occurred and the employee’s pay was reduced.

With regard to disciplinary deductions, DOL recognizes the increasing liability of employers for their employees’ conduct, particularly with respect to sexual harassment, workplace violence, drug and alcohol violations, and violations of state or federal laws, and the corresponding need for employers to be able to impose disciplinary suspensions of less than one week without pay for violations of workplace conduct rules. The regulations allow these deductions as long as there is a written policy in place that applies to all employees. The employer can suspend an exempt employee for one or more full days for disciplinary reasons under the written policy without losing the exemption.

Current regulations provide that employers will not lose the exemption if an employee’s pay is merely “subject to” impermissible deductions; instead, the employer must have an “actual practice” of making improper deductions. There is a “safe harbor” rule that protects employers from violations of the salary basis test through impermissible pay deductions if the employer demonstrates a good faith effort to comply with the FLSA by:

1. Having a clearly communicated policy that prohibits improper pay deductions;
2. Having a complaint mechanism in place that allows employees to bring the mistake to the employer’s attention;
3. Reimbursing the employee for improper deduction(s); and
4. Making a good faith commitment to comply in the future.

Under old rules, it was possible to violate the salary basis test by seemingly inconsequential actions as having exempt employees punch a time clock, or by paying exempt employees overtime and compensatory time. The current regulations eliminate these problems by providing that an exempt employee can receive additional compensation above the guaranteed minimum salary, and it can be based on additional hours worked beyond the normal workweek. The additional compensation may be paid on any basis, including flat sum, bonuses, straight-time hourly amounts, time-and-one-half or any other hourly basis, and it may include compensatory time. 29 C.F.R. § 541.604.

The following groups of employees are not subject to the salary basis test: teachers, doctors, lawyers, and those software professionals who are paid on an hourly basis at least $27.63 per hour. These occupations have special rules exempting them from the salary basis test. Also, for academic administrative employees the salary basis requirement can be met by compensation on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment where the employee is employed.

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[1] The salary basis requirement does not apply to lawyers and licensed or certified doctors and teachers. For certain computer-related occupations under the professional exemption, they need not be paid a salary if they are paid on an hourly basis at a rate not less than $27.63 an hour. See FLSA Fact Sheet No. 17A, Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees under the Fair Labor Standards Act (U.S. Department of Labor, Wage and Hour Division). Also, for academic administrative employees the salary basis requirement can be met if the employee is compensated on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment where the employee is employed. 29 C.F.R. §§ 541.204(a)(1), 541.600.


These special provisions apply only when the absence is occasioned by the employee for illness or personal reasons. Deductions cannot be made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions cannot be made for time when work is not available. 29 C.F.R. § 541.602.

In the preamble to the 2004 amendments the DOL stated that the rules regarding deductions for violations workplace conduct rules are to be narrowly construed to apply only to serious conduct issues and not to employee performance or attendance. Accordingly, disciplinary deductions for chronic tardiness or absenteeism would not be allowed.

The regulations set out the following factors that may be considered, among other things, as a guide to determining whether an employee satisfies the primary duty requirement:

- The relative importance of the exempt duties as compared with other types of duties;
- The amount of time spent performing exempt work;
- The employee's relative freedom from direct supervision; and
- The relationship between the employee's salary and the wages paid other employees for the kind of non-exempt work performed by the employee.

The amount of time spent performing exempt work is considered a “useful guide” under the regulations, but it is not the determining factor. The regulations have eliminated any absolute requirement that an employee spend more than 50 percent of his or her time performing exempt work, stating instead that employees who spend more than 50 percent of their time performing exempt work generally will satisfy the primary duty requirement but time alone is not the sole test. Employees who spend less than 50 percent of their time performing exempt duties can still be exempt if the other factors warrant that conclusion. Executive employees who perform both exempt and non-exempt work generally will not be disqualified from exemption as long as the executive makes the decision regarding when to perform non-exempt duties and the executive remains responsible for the success or failure of the business operations under his or her management while performing non-exempt duties.

Executive Employee Exemption

The executive exemption applies to managerial employees. To be classified as a bona fide executive employee under the FLSA regulations, all of the following requirements must be met:

1. The employee must be compensated on a salary basis at a rate not less than $684 per week ($35,568 per year);
2. The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
3. The employee must customarily and regularly direct the work of two (2) or more other full-time employees, or their equivalent; and
4. The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

The regulations give the following examples of “management” functions: interviewing, selecting, and training employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among employees; determining the type of materials, supplies, machinery or tools to be used; and providing for the safety of the workers and the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.[2]

The requirement that an executive employee direct the work of two or more employees is satisfied when the executive supervises at least two full-time employees or the equivalent. For example, the executive could supervise one full-time employee and two part-time employees,[3] The phrase “customarily and regularly” as used in the regulations signify a greater frequency than occasional, but may be less than constant.[4]

The regulations also contain factors that may be considered in determining whether the executive employee’s suggestions and recommendations are given “particular weight.” These factors include: whether it is part of the employee’s job to make suggestions and recommendations; the frequency with which they are made or requested; and the frequency with which the employee’s suggestions and recommendations are relied upon. The employee’s suggestions and recommendations may have “particular weight” even if a higher level manager’s recommendation has more importance or even if the employee does not have the ultimate decision making authority.[5] Evidence that an employee’s recommendations are given particular weight could include the employee’s job description, testimony that the recommendations were made and considered, and performance reviews that show the employee’s role in other Workers’ promotions or other change in status.


Administrative Employee Exemption

Reference Number: CTAS-141

To qualify for this exemption, an employee’s primary duty must be the performance of work that is directly related to the management or general business operations of the employer. The exemption generally includes executive and administrative assistants, advisory specialists, and employees who are in charge of a functional department that may include only one person. To be classified as a bona fide administrative employee under the FLSA, all of the following requirements[1] must be met:

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $684 per week ($35,568 per year);
2. The employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the
employer or the employer’s customers; and

3. The employee’s primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

To meet the requirements of the exemption, the employee must perform work that is directly related to assisting with the running or servicing of the business. Work directly related to management policies or general business operations is defined under the regulations to include, but not be limited to, work in functional areas such as tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, government relations, computer network and Internet activities, legal and regulatory compliance and similar activities. [2]

The regulations set out ten factors for determining whether an employee meets the requirement that the employee exercise “discretion and independent judgment with regard to matters of significance.” These factors are:

1. Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;
2. Whether the employee carries out major assignments in conducting the operations of the business;
3. Whether the employee performs work that affects the business operations to a substantial degree, even if the employee’s assignments are related to the operation of a particular segment of the business;
4. Whether the employee has authority to commit the employer in matters that have significant financial impact;
5. Whether the employee has authority to waive or deviate from established policies and procedures without prior approval;
6. Whether the employee has authority to negotiate and bind the company on significant matters;
7. Whether the employee provides consultation or expert advice to management;
8. Whether the employee is involved in planning long- or short-term business objectives;
9. Whether the employee investigates and resolves matters of significance on behalf of management; and
10. Whether the employee represents the company in handling complaints, arbitrating disputes, or resolving grievances. [3]

The regulations also state that the “discretion and independent judgment” requirement still can be met even if their decisions are subject to review at a higher level, and even if the employee’s duties consist of recommending action rather than the actual taking of action, as long as the other relevant factors warrant the conclusion. However, it must be more than the use of skill in applying well-established procedures or standards described in manuals [4] or other sources, and it does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. [5]

[1] These requirements are set out in 29 C.F.R. § 541.200.
[4] In 29 C.F.R. § 541.704, it is noted that the use of manuals does not automatically exclude an employee from an exemption. The use of manuals, guidelines or other procedures that relate to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not affect an employee’s exempt status.
Professional Employee Exemption

Reference Number: CTAS-142

Generally included in this exemption are the so-called “learned professions” such as medicine, law and dentistry; artistic professions and architects; teachers and professors; engineers and scientists; registered nurses; computer programmers, computer systems analysts, and software engineers; and some accountants, depending on training and job duties.[1] To qualify for the learned professional exemption under the FLSA, all of the following requirements[2] must be met:

1. The employee must be compensated on a salary or fee basis at a rate not less than $684 per week ($35,568 per year);[3]
2. The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work that is predominantly intellectual in character and includes work requiring the consistent exercise of discretion and judgment;
3. The advanced knowledge must be in a field of science or learning; and
4. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

The regulations state that the phrase “work requiring advanced knowledge” means that it must be predominantly intellectual in character which requires the exercise of discretion and judgment. The phrase “field of science or learning” includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status. The phrase “customarily acquired by a prolonged course of specialized intellectual instruction” restricts this exemption to professions where specialized academic training is a standard pre-requisite for entrance into the profession, or employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained their knowledge through a combination of work experience and intellectual instruction.[4]

Certified public accountants generally meet the requirements for the exemption, and many other accountants who are not CPAs but who perform similar job duties may qualify, but accounting clerks, bookkeepers and other employees who perform a great deal of routine work usually will not qualify as exempt professionals.[5]

[1] There is also an exemption for creative professionals such as artists, musicians, actors and writers, but since counties generally do not employ these kinds of professionals the exemption is not discussed. For more information, see 29 C.F.R. § 541.302.
[2] The requirements are set out in 29 C.F.R. § 541.301.
[3] These salary requirements do not apply to teachers, doctors, or lawyers. 29 C.F.R. §§ 541.303 and 541.304

Computer Employee Exemption

Reference Number: CTAS-143

The regulations consolidated the requirements for certain highly-compensated computer professionals. Computer analysts, computer programmers, software engineers and other similarly skilled workers in the computer field are eligible for this exemption. To qualify for the computer professional exemption under the FLSA, the following requirements[1] must be met:

1. The employee must be compensated either on a salary or fee basis at a rate not less than $684 per week or, if compensated on an hourly basis, at a rate not less than $27.63 an hour;
2. The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;

3. The employee’s primary duty must consist of:
   • The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
   • The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
   • The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
   • A combination of the aforementioned duties, the performance of which requires the same level of skills.

This exemption does not include employees who repair computer hardware and related equipment. Computer employees who do qualify for this exemption often have duties that would qualify them for the administrative or executive exemptions.

[1] The requirements are set out in 29 C.F.R. § 541.401.

Highly Compensated Worker Exemption

Reference Number: CTAS-144

The regulations create a special category of exemption for employees who earn $107,432 or more per year, known as the “highly compensated worker” rule. An employee meets this exemption if he or she meets the following requirements:[1]

1. The employee earns total annual compensation of $107,432 or more, which includes at least $684 per week paid on a salary or fee basis;
2. The employee’s primary duty includes performing office or non-manual work; and
3. The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

[1] The requirements are set out in 29 C.F.R. § 541.601.

Seasonal Recreational Employees

Reference Number: CTAS-145

Section 13(a)(3) of the FLSA provides an exemption from the minimum wage and overtime provisions of the FLSA for “any employee employed by an establishment which is an amusement or recreational establishment, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33-1/3 per cent of its average receipts for the other six months of such year.” Receipts for this purpose are fees received from admissions. Examples of recreational or amusement establishments that may qualify for this exemption are outdoor swimming pools, golf courses and recreational parks that operate on a seasonal basis. A publicly operated amusement or recreational establishment whose operating costs are met wholly or primarily from tax funds would fail to meet the requirements of (B) above so its employees could not qualify for the exemption under that section, but the employees could qualify under (A) above if the establishment is not open more than seven months each year.

Public Safety Employees

Reference Number: CTAS-146
There is an extremely limited exemption from the overtime provisions of the FLSA for law enforcement and fire department personnel in counties that employ fewer than five full or part-time firefighters or fewer than five full or part-time law enforcement officers. All employees on the payroll must be counted, regardless of whether they are currently working, including employees on worker’s compensation leave, parental leave, FMLA leave, administrative leave, etc. This exemption can apply during one week and be inapplicable during the next week.\[1\] See Public Safety for more details.

\[1\] See 29 U.S.C. § 213(b)(20) and 29 C.F.R. § 553.200.

**Wages and Overtime**

Reference Number: CTAS-147

Payment of both minimum wage and overtime compensation due an employee must ordinarily be made at the regular payday for the workweek, or when the pay period covers more than a single week, at the regular payday for the period in which the particular workweek ends. However, when it is not possible to ascertain, prior to preparing the payroll, the number of overtime hours worked by an employee in the last workweek of the pay period, the requirements of the FLSA will be satisfied if the employer pays the overtime compensation as soon after the regular payday as is practicable. Such a payment should not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for the payment of the amounts due, but in any event not later than the next payday after such computation can be made.

**Minimum Wage Provisions**

Reference Number: CTAS-164

Every covered, non-exempt worker is entitled to a minimum wage of not less than $7.25 per hour effective July 24, 2009.\[1\] An employee may be paid on a weekly, monthly, or some other basis as long as the employee receives at least the minimum wage for each hour actually worked. Employees may be paid a salary in lieu of hourly compensation so long as the salary meets minimum wage and overtime requirements.

Although federal law allows certain employees such as disabled workers, apprentices, student workers, and messengers to be exempted from minimum wage requirements, Tennessee law requires employers to pay no less than the federal minimum wage of $7.25 to all employees. T. C. A. § 50-2-114.

**Deductions from Wages.** Deductions may be made from wages for the employee’s share of social security, as well as other federal, state, or local taxes, levies or assessments, and for voluntary payments to insurance and retirement plans, without affecting the minimum wage rate. No deductions can be made for any tax which the law requires to be borne by the employer.

Deductions made from wages for items considered primarily for the benefit or convenience of the employer are permitted only to the extent that they do not reduce the wages of employees below the minimum wage or cut into overtime compensation required by the FLSA for non-exempt employees. These items include deductions for damage to the employer’s property, cash shortages, uniforms, and tools or equipment used in the employee’s work.

If an employee is required to wear a uniform, the cost of the uniform is considered to be a business expense of the employer. If the employer requires the employee to bear the cost, it may not reduce the employee’s wage below the minimum wage or cut into overtime compensation required by the FLSA. For example, if an employee who is subject to the statutory minimum wage of $7.25 is paid an hourly wage of $7.25, the employer may not make any deduction from the employee’s wages (either regular wages or overtime wages) for the cost of the uniform, nor may the employer require the employee to purchase the uniform on his/her own. However, if the employee is paid $8.00 an hour and works 40 hours in the workweek, the maximum amount the employer could legally deduct from the employee’s wages would be $30.00 ($0.75 X 40 hours).
If an employee is required to purchase a uniform and equipment as a condition of employment, the employer is required to reimburse the employee, no later than the first regular payday, to the extent that the cost of the uniform and equipment cuts into the minimum wage or overtime compensation required by the FLSA. For example, if a police officer hired at an hourly rate of $10.00 is required to purchase a $65.00 uniform, $50.00 leather goods and a $200.00 revolver as a condition of employment, and works 80 hours in his or her first 14-day tour of duty, the $315.00 of required expenses would have the effect of reducing the officer’s compensation below minimum wage and would therefore violate the FLSA ($10.00 x 80 = $800.00 - $315.00 = $485.00 or $6.06 per hour). The employee would have to be paid the difference to bring the wages up to minimum wage ($7.25 - $6.06 = $1.19 x 80 = $95.20). The $95.20 must be added to the employee’s next paycheck in order for the minimum wage requirements to be met.

There are methods of requiring employees to pay for their uniforms and equipment which are acceptable under the FLSA. The most common method is for the employer to make the initial purchase and prorate deductions from the employees’ wages for reimbursement. Another method is by periodic payment of uniform allowances with the employer paying for the initial uniform and equipment. The predominant point to keep in mind is that the employee's wages can never be reduced below minimum wage, nor can the payment of overtime required by the FLSA be reduced, by the purchase of such required items.[2]

If the employer is required by court order to pay monies from wages to a third party under garnishment, wage attachment, or bankruptcy proceedings, such deductions from wages are permissible so long as neither the employer nor anyone acting on the employer’s behalf derives any profit or benefit from the transaction.[3] Payments so made are considered equivalent to payments of wages to the employee. Further, the FLSA does not prohibit voluntary assignment of wages by the employee to a third party provided that neither the employer nor anyone acting on the employer’s behalf directly or indirectly derives any profit or benefit from the transaction.

Detailed rules for deductions from wages can be found in 29 C.F.R. § 531, and are explained in FLSA Fact Sheet #16, Deductions From Wages For Uniforms and Other Facilities under the Fair Labor Standards Act.

[2] It is the DOL’s position that non-voluntary deductions cannot be made from an employee’s wages during any week the employee has worked overtime.
[3] The requirements of Title III of the federal Consumer Credit Protection Act (the federal Wage Garnishment Law), 15 U.S.C. § 1671 et seq., and the regulations found at 29 C.F.R. part 870, must be considered when making deductions of this type. That act contains restrictions on the amount of deductions from wages that may be made for payment of debts. State garnishment laws must also be followed.

Overtime Provisions

Reference Number: CTAS-165

The FLSA requires that an employer compensate covered, nonexempt employees who work in excess of a maximum number of hours in an applicable workweek or work period on a time-and-one-half basis for all hours in excess of the number of allowable hours. For most employees the relevant work period is the seven-day workweek, and the maximum number of hours is 40. However, a longer work period may be used for public safety employees and hospital and similar employees if the local government follows specific procedures established by the FLSA. If these specific procedures for establishing longer work periods are not followed, all local government employees covered by the FLSA, including firefighters and law enforcement officers, must be compensated for hours worked in excess of 40 hours in a seven-day period.

Many employees work only a part-time work schedule (e.g., 15 to 20 hours per week). Other employees work full-time but work 35- or 37½-hour workweeks. In such instances, overtime pay under the FLSA is not required to be paid to employees until they work in excess of 40 hours in a workweek. (Note, however, that the employee may be entitled to pay at the regular rate for any additional hours up to 40, depending on the employer’s established policy.)

There is no limitation under the FLSA on the number of hours employees may work in any work
period. They may work as many hours as they and their employer see fit, as long as they are compensated in accordance with the FLSA’s requirements. The FLSA does not require overtime compensation for hours in excess of eight per day (except under the special provisions relating to hospital and similar employees) or for work on Saturdays, Sundays or holidays.

It is not required that overtime compensation be paid weekly. The general rule is that overtime pay earned in a particular work period must be paid on the regular payday for the period. If the correct amount of overtime pay cannot be determined until sometime after the regular pay period, the employer must pay the overtime compensation as soon thereafter as practical, but not later than the next regular pay period.

Calculating Overtime Pay

Reference Number: CTAS-129

Overtime pay is calculated by multiplying the employee’s regular rate of pay by one and one-half times the number of overtime hours worked. The regular rate is defined as the rate per hour paid for normal non-overtime work. In cases in which the employee is paid on a weekly basis, the regular rate is determined by dividing the weekly salary by the number of hours in the employee’s regular workweek. Payments which need not be included in the regular rate include reimbursement for expenses incurred on the employer’s behalf; premium pay for extra time worked (holidays, weekends, additional hours over regular schedule); discretionary bonuses, gifts and payments in the nature of gifts on special occasions; reasonable uniform allowances; and payments for occasional periods when no work is performed due to vacation, holidays or illness.

The following are examples of compensation paid to non-exempt employees that is includable in the regular rate of pay:

- On-call pay
- Bonuses promised for good attendance, continuation of the employment relationship, incentive, production, and quality of work
- Employee lunch or meal expenses paid by the employer, unless the expense is incurred on the employer’s behalf or for the employer’s benefit (e.g., dinner money while working late or meal expenses while out of town on business)
- Salaries
- Salary increases, including retroactive increases
- Shift differentials, hazardous duty pay and longevity pay
- Travel expenses of employees going to and from work, if they are paid by the employer

The regular rate of pay and overtime must be calculated prior to making deductions from wages, such as deductions for charitable contributions by the employee, garnishments, insurance premiums paid for the employee’s convenience, re-payment of salary advances, withholding taxes for or on behalf of the employee, health plan contributions, and voluntary wage assignments.

The FLSA does not require employers to pay employees on an hourly basis. Their earnings may be determined on a daily rate, salary, commission, or some other basis, but in such case the overtime pay due must be computed on the basis of the hourly rate derived from such earnings. The regular hourly rate of pay of an employee is determined by dividing the total remuneration for employment (except the statutory exclusions) in any workweek by the total number of hours actually worked in the workweek. A few examples will illustrate the application of this principle in particular instances.

Hourly Rate Employees

Reference Number: CTAS-962

If an employee is employed solely on the basis of a single hourly rate, the hourly rate is the “regular rate.” For overtime hours the employees must be paid, in addition to the straight-time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked over 40 in the week. If, for example, the hourly rate is $10.00 and an employee works 46 hours in a week, the employee would be entitled to receive $490.00 (46 hours at $10.00 plus six hours at $5.00; or stated another way, 40 hours at $10.00 plus six hours at $15.00 (time and
one-half)). The regulations governing hourly rate employees are found at 29 C.F.R. § 778.110.

Day Rates and Job Rates

Reference Number: CTAS-963
An employee may be paid a flat sum for a day’s work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and receive no other form of compensation. In such a case the employee’s regular rate is found by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. The employee is then entitled to extra half-time pay at this rate for all hours worked over 40 in the workweek. This method of payment is common for school bus drivers. The regulations on this topic are found at 29 C.F.R. § 778.112.

Employees Paid on a Salary Basis

Reference Number: CTAS-964
If an employee is employed solely on a weekly salary basis, the regular hourly rate of pay is computed by dividing the salary by the number of hours which the salary is intended to compensate. Example 1: If an employee is hired at a salary of $250 and it is understood that this salary is compensation for a regular workweek of 35 hours, or $7.14 an hour, when overtime is worked the employee is entitled to receive $7.14 for each of the first 40 hours and $10.71 (time and one-half) for each hour thereafter. Example 2: If an employee is hired at a salary of $350 for a 40-hour week, the regular rate is $8.75 an hour.

For employees who regularly work less than 40 hours in a workweek, state law requires that the county employer have a written policy in place that states whether the salary is intended to compensate the employee for all hours worked up to and including 40 in the workweek, or whether it compensates the employee for the regular work schedule. This will affect the hourly rate, as it did in the two examples above. Also, if the salary does not compensate the employee for the full 40 hours as in the first example above, and if the employee works more than the 35 hours (or other amount) that the salary covers, the employee will have to be paid for the additional hours at the regular hourly rate up to and including 40 hours, and for any hours worked over 40 at the rate of time and one-half.

Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent. A monthly salary can be converted to its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semi-monthly salary is converted to its equivalent weekly wage by multiplying by 24 and dividing by 52. The regulations on overtime for salaried employees are found at 29 C.F.R. § 778.113.


Employees Working at Two or More Rates

Reference Number: CTAS-965
Where an employee in a single workweek works at two or more different types of work for which different straight-time rates have been established, the regular rate for that week is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs. Such an employee may agree with his or her employer in advance to be paid overtime for the type of work that is performed during the overtime hours. An example of this might be a school librarian who also works part of the week as a teacher’s aide at a different rate of pay. The regulations on this topic are found at 29 C.F.R. §§ 778.115 and 778.419.

Multiple Jobs/Dual Employment

Reference Number: CTAS-966
The DOL views a county as a single employer so that an employee who works for two different departments of the same county is considered to be working for the same employer. Therefore, all
jobs the employee performs for the county must be aggregated for overtime purposes. If both jobs are non-exempt work, see Employees Working at Two or More Rates. If the two jobs are both exempt work, of course there is no overtime problem. If an exempt employee also performs a second job which is non-exempt, the employee’s primary duty must continue to be exempt work or the employee will lose the exemption for all of the work. The primary duty requirement is discussed in more detail under Exempt Employees, but essentially if the employee’s primary duty continues to be exempt work, the employee may perform some nonexempt work without losing the exemption. The general rule of thumb is that non-exempt work cannot exceed 50 percent of the employee’s time, but it depends on the facts and circumstances of each case. Also, while exempt employees must be paid on a salary basis, the regulations now allow exempt employees to receive additional compensation above the guaranteed minimum salary and it can be based on additional hours worked above the normal workweek.\footnote{29 C.F.R. § 541.604.}

There is a limited exception to the requirement that the hours of both jobs be combined for overtime purposes. This occurs when an employee works on an \textit{occasional or sporadic} basis in a different job for the county.

\footnote{29 C.F.R. § 541.604.}

**Occasional or Sporadic Employment**

\textbf{Reference Number: CTAS-967}

Where county employees, solely at the employee’s option, work occasionally or sporadically for the county in a different capacity from their regular employment, the hours worked in the different jobs are not combined for the purpose of determining overtime liability. However, two major restrictions apply to this exception: (1) the additional work may be done only on an occasional or sporadic basis; and (2) the work must be in a different capacity from the employee’s regular work.\footnote{29 C.F.R. § 553.30.}

“Occasional or sporadic” means infrequent, irregular, or occurring in scattered instances. However, the mere fact it is a recurring activity does not necessarily mean it fails to be occasional or sporadic. The regulations suggest that part-time work that is regularly scheduled is not sufficiently irregular to qualify for the exception.

"Solely at the employee’s option” means freely and without coercion, implicit or explicit, from the employer. A suggestion that the employee is free to refuse is allowed. Examples of such activities include taking tickets or providing security for special events, officiating youth sporting events and concession work at special events.

Under the "different capacity” prong of the test, DOL will rely primarily on whether the two jobs are classified as different occupations under the three-digit classification system established by the U.S. Department of Commerce’s Dictionary of Occupational Titles (DOT). If they are in the same three-digit occupational category, then they will be deemed not to be sufficiently different. If, however, they fall into separate three-digit occupational classifications, they are likely to be considered sufficiently different to qualify for the exception. The three-digit classifications tend to be relatively broad (e.g., secretaries, stenographers, and typists represent a single occupational category) and, consequently, certain jobs, even though clearly different in a practical sense, will not qualify as “different capacity” jobs for purposes of the exception.

Public safety employees taking on any kind of security or safety function within the same local government are never considered to be employed in a “different capacity,” nor are teachers doing coaching or career counseling. It is not clear, however, that this provision is of any real significance as teachers are generally exempt from the FLSA under the exemption for professional employees.
On-Call Pay

Reference Number: CTAS-968

If an employee who is “on call” is free to use the time as he or she pleases, not confined to home or any particular place but required only to leave word where he or she may be reached, the hours spent “on call” generally are not regarded as working time. The FLSA does not require any compensation for carrying a beeper or being on call. However, if the employer chooses to pay the employee for this non-working time, the payment must be included in the employee’s regular rate of pay even though it is not attributable to any specific hours worked. For example, an employee is paid $8.00 an hour for 40 hours of work and is paid $25.00 for being on call over the weekend. If the employee is called back for four hours of work over the weekend, the employee’s regular rate would be computed as follows: the employee’s total straight time pay is $320.00 (40 hours x $8.00) plus $25.00 “on call” pay plus $32.00 for four weekend hours of work, or $377.00. Dividing the employee’s total earnings of $377.00 by 44 hours of work yields a regular rate of $8.57 for the employee. One-half the regular rate ($4.29) times four overtime hours equals $17.16 of overtime pay due the employee, making the total pay due the employee $394.16 for the week.


Fixed Salary for Fluctuating Hours

Reference Number: CTAS-168

The FLSA authorizes the payment of a fixed salary for fluctuating hours. The regulations[1] provide that a salaried employee may have hours of work that fluctuate from week to week and the salary may be paid pursuant to an understanding with the employer that the employee will receive such fixed amount as straight time pay for whatever hours the employee is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding between the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, this kind of salary arrangement is permitted by the FLSA. The amount of the salary must be sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour the employee works. The employee must also receive extra compensation, in addition to the regular salary, for all overtime hours worked at a rate not less than one-half his or her regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because the hours have already been compensated at the straight time regular rate under the salary arrangement. The fixed salary can cover hours in excess of 40 hours a week, provided the employee has a clear understanding that the salary constitutes straight-time pay for all hours worked and the straight-time pay is equal to or exceeds the required minimum wage of $7.25. The fixed salary must be large enough to insure that the employee’s hourly earnings from the salary will not fall below minimum wage. The employee must understand that the salary covers whatever hours the job may demand in a particular workweek. The employer must pay the salary even though the workweek is one in which a full schedule of hours is not worked. Also, it should be noted that employees who are paid under the rules for fluctuating workweeks are not eligible to receive compensatory time in lieu of cash overtime payments.

For an employee whose hours of work fluctuate from week to week and who is paid a fixed salary with the clear understanding that the salary constitutes straight-time pay for all hours worked, the regular rate of pay will vary from week to week. The regular rate is obtained for each week by dividing the fixed salary by the number of hours worked in that week, but cannot, of course, fall below the required minimum hourly wage in any week. Since straight-time compensation has already been paid for all hours worked by way of the fixed salary, the employee is entitled to
receive overtime pay for each hour worked over 40 in the workweek at a rate of not less than one-half this straight-time compensation. As an example, consider the employee who is compensated on a fluctuating workweek basis at a weekly salary of $500. If during the course of four weeks the employee works 40, 44, 50 and 48 hours, the regular hourly rate of pay in each of these weeks is $12.50, $11.36, $10.00 and $10.42. Since straight-time pay for all hours worked has already been paid by the fixed salary, only an additional half-time pay is due for each hour over 40 in each week. For the first week the employee is due $500.00; for the second week $522.72 ($500 plus 4 hours at $5.68); for the third week $550.00 ($500.00 plus 10 hours at $5.00); for the fourth week $541.68 ($500 plus eight hours at $5.21).

[1] These regulations are found at 29 C.F.R. § 778.114.

Determination of Applicable Workweek or Work Period

Reference Number: CTAS-969
The FLSA authorizes the establishment of different work periods for different types of employees. The general rule for regular employees applies to all covered local government employees, unless a different work period is properly established as authorized by the FLSA for public safety employees or hospital workers.

For regular employees, the maximum number of allowable hours that may be worked before overtime must be paid is 40 hours per workweek. The workweek, as defined by the FLSA, is a fixed and regularly recurring period of 168 hours or seven consecutive 24-hour periods. The workweek need not coincide with the calendar week but may begin on any day and at any hour of the day. A single workweek may be established for all employees, or different workweeks may be established for different employees or groups of employees. Once the beginning time of an employee’s workweek is established it remains fixed, but may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the FLSA.

The FLSA requires a single workweek as its standard and does not permit averaging of hours over two or more weeks. For example, an employee who works 30 hours one week and 50 hours the next must receive overtime pay for the hours worked beyond 40 in the second week, even though the average number of hours worked in the two weeks is 40. This is true regardless of whether the employee works on a standard or swing shift schedule and regardless of whether payment is made on a daily, weekly, bi-weekly, monthly or other basis.

Overtime Pay May Not Be Waived

Reference Number: CTAS-992
The requirement that overtime must be paid after 40 hours a week cannot be waived by agreement between the employer and employees. Similarly, an agreement that only eight hours a day or only 40 hours a week will be counted as working time will clearly fail. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not impair the employee’s right to compensation for the overtime work that the employer suffers or permits (has knowledge of).

Public Safety Employees-7(k) Exemption

Reference Number: CTAS-970
The FLSA contains a provision that allows the establishment of longer work periods of not less than seven days nor more than 28 days for public safety employees of state and local governments. This partial exemption from the overtime provisions of the FLSA is often referred to as the "7(k)" exemption, or the "tour of duty" rules. [1]

Public safety personnel employees are those employees engaged in fire protection or law enforcement activities. The term also may include rescue and ambulance service personnel if such personnel form an integral part of the public agency’s fire protection or law enforcement activities. Since these special rules are limited to public agencies, they do not apply in cases in which public safety services are provided to a county under a contract with a private organization.
The regulations for this somewhat complicated procedure are found in 29 C.F.R. part 553, subpart C.

Fire Protection Activities

Reference Number: CTAS-971

The regulations setting out the requirements of the § 7(k) partial exemption for fire protection personnel are found at 29 C.F.R. § 553.210. To be eligible for this exemption, an employee must meet all of the following criteria:

- be trained in fire suppression;
- have the legal authority and responsibility to engage in fire suppression;
- be employed by a fire department of a municipality, county, fire district, or state; and
- be engaged in the prevention, control and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

Fire protection employees can include firefighters, paramedics, emergency medical technicians, rescue workers, ambulance personnel, and hazardous materials workers as long as they meet the criteria listed above. There is no limit on the amount of nonexempt work that an employee employed in fire protection activities may perform. If the employee meets the criteria, the employee qualifies for the partial exemption. (The 80/20 rule for firefighters was deleted from the regulations in 2011.)

Not included in the term "employee in fire protection activities" are the so-called "civilian" employees of a fire department, fire district, or forestry service who engage in such support activities as those performed by dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, camp cooks, clerks, stenographers, etc. These support employees do not qualify for the partial exemption.

Law Enforcement Personnel

Reference Number: CTAS-972

The regulations setting out the requirements of the § 7(k) exemption for law enforcement officers are found at 29 C.F.R. § 553.211. To be eligible for the exemption for law enforcement officers, an employee must meet each of the following three criteria:

- be a uniformed or plain-clothed member of a body of officers and subordinates who are empowered by State statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes,
- have the power to arrest, and
- be presently undergoing or have undergone or will undergo on-the-job training and/or a course of instruction and study that typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics.

In order to qualify, a law enforcement employee must spend 80 percent or more of his or her time engaged in law enforcement activities, or activities that are incidental to or in conjunction with fire protection or law enforcement duties. This is sometimes referred to as the "80% rule" or the 20 percent limitation on non-exempt work, found in 29 C.F.R. § 553.212.

Employees who meet these tests are considered to be engaged in law enforcement activities regardless of their rank, or of their status as "trainee," "probationary," or "permanent," and regardless of their assignment to duties incidental to the performance of their law enforcement activities such as equipment maintenance, lecturing, or support activities, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity.

Typically, employees engaged in law enforcement activities include deputy sheriffs, criminal
investigators or detectives who are regularly employed and paid as such, and court marshals or
deputy marshals. The term also may include rescue and ambulance service personnel if such
personnel form an integral part of the county’s law enforcement activities.

The exemption also specifically covers security personnel in correctional institutions, which
includes county jailers. A correctional institution is any governmental facility maintained as part
of a penal system for the incarceration or detention of persons suspected or convicted of having
breached the peace or committed some other crime, and includes county jails and workhouses.
Employees of correctional institutions who qualify as security personnel for purposes of the special
rules are those who have responsibility for controlling and maintaining custody of inmates and of
safeguarding them from other inmates or for supervising such functions, regardless of whether
their duties are performed inside the correctional institution or outside the institution (as in the
case of road gangs). These employees are considered to be engaged in law enforcement activities
regardless of their rank (e.g., warden, assistant warden, guard) or of their status as “trainee,”
“probationary,” or “permanent,” and regardless of their assignment to duties incidental to the
performance of their law enforcement activities, or to support activities of the type described
whether or not such assignment is for training or familiarization purposes or for reasons of illness,
injury or infirmity.

Employees who do not meet the tests described above are not engaged in “law enforcement
activities” and do not qualify for the exemption. Employees who normally would not meet these
tests include (1) most building inspectors, (2) health inspectors, (3) animal control personnel, (4)
sanitarians, (5) civilian traffic employees who direct vehicular and pedestrian traffic at specified
intersections or other control points, (6) civilian parking checkers who patrol assigned areas for
the purpose of discovering parking violations and issuing appropriate warnings or appearance
notices, (7) tax compliance officers, and (8) building guards whose primary duty is to protect the
lives and property of persons within the limited area of the building.

Also not included within the exemption are the so-called “civilian” employees of law enforcement
agencies or correctional institutions who engage in such support activities as those performed by
dispatchers, radio operators, apparatus and equipment maintenance and repair workers, janitors,
clerks and stenographers. The exemption also does not include employees in correctional
institutions who engage in building repair and maintenance, culinary services, teaching, or in
psychological, medical or paramedical services. This is true even though such employees may,
when assigned to correctional institutions, come into regular contact with the inmates in the
performance of their duties.


Fire Protection and Law Enforcement

Reference Number: CTAS-973

Employees who engage in both fire protection and law enforcement activities may use the special
§ 7(k) rules, provided that each of the activities performed meets the appropriate tests. This is
true regardless of how the employee’s time is divided between the two activities. However, all
time spent in nonexempt activities by public safety officers within the work period, whether
performed in connection with fire protection or law enforcement functions, or with neither, must
be combined for purposes of the 20 percent limitation on nonexempt work discussed in 29 C.F.R.
§ 553.212.

The maximum hours standards are different for employees engaged in fire protection and for
employees engaged in law enforcement. For those employees who perform both fire protection
and law enforcement activities, the applicable standard is the one which applies to the activity in
which the employee spends the majority of work time during the work period. For more
information on this topic, see the regulations found at 29 C.F.R. § 553.213.

Trainees

Reference Number: CTAS-974

Attendance at a bona fide fire or police academy or other training facility, when required by the
county, constitutes engagement in fire protection or law enforcement activities as long as the employee meets all the applicable tests (except for the power of arrest for law enforcement personnel) for the partial exemption under § 7(k). If the applicable tests are met, then basic training or advanced training is considered incidental to, and part of, the employee's fire protection or law enforcement activities. See 29 C.F.R. § 553.214. For more information on this topic, see Training Time under Compensable Hours.

**Emergency Medical Service Employees**

**Reference Number:** CTAS-975

Emergency medical service employees often work in conjunction with law enforcement agencies and/or fire departments. Under regulations found at 29 C.F.R. § 553.210, paramedics, emergency medical technicians, rescue workers, and ambulance personnel may qualify for the § 7(k) exemption if they meet all of the requirements for an "employee in fire protection activities," which means that the employee: (1) is trained in fire suppression, (2) has the legal authority and responsibility to engage in fire suppression, (3) is employed by a fire department of a municipality, county, fire district, or state, and (4) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

Courts interpreting these requirements appear to focus on whether the employee has the responsibility to engage in fire suppression. The outcome turns on whether the employee has a real obligation or duty to fight fires. The court in *Cleveland v. City of Los Angeles*, 420 F.3d 981 (9th Cir. 2005), *cert. denied* 126 S. Ct. 1344 (2006), looked at six factors to determine whether dual function paramedics/firefighters had "some real obligation or duty" to engage in fire suppression. The Department of Labor also used these factors in making its determination in Wage and Hour Opinion Letter FLSA2006-20, dated June 1, 2006, noting, "If a fire occurs, it must be their job to deal with it." The six-factor test examines evidence of the following:

1. the paramedic carries firefighting gear and breathing apparatus,
2. dispatchers assume that at least one dual function firefighter/paramedic is in each ambulance dispatched to a call,
3. paramedic ambulances are regularly dispatched to fire scenes and not just when there is a need for advanced life support medical services,
4. dual function firefighter/paramedics are always expected to wear fire protective gear at a fire suppression scene,
5. they are expected to provide emergency medical services as their primary responsibility but they also routinely perform fire suppression duties when not needed for medical care, and
6. they are routinely ordered to perform fire suppression duties.

Based on the evidence presented, the court in *Cleveland v. City of Los Angeles* found that there was no real duty to perform fire suppression activities. Applying these factors to different facts and circumstances, the Department of Labor found in its 2006 opinion that the dual-function firefighter/paramedics did have a real obligation to engage in fire suppression. The Department of Labor also noted that those firefighter/paramedics, as part of their fire suppression duties, regularly attended fire suppression training and presented fire prevention awareness programs.

**Tours of Duty**

**Reference Number:** CTAS-976

The FLSA authorizes the establishment of work periods of not less than seven nor more than 28 days for public safety personnel. The regulations establish the maximum allowable non-overtime hours as 212 hours per 28-day period for firefighters, and 171 hours per 28-day period for law enforcement officers. For tours of duty of less than 28 days, the maximum allowable non-overtime hours of work during the tour of duty must bear the same ratio as 212 hours to 28 days for firefighters (7.57 hours per day), and 171 hours to 28 days for law enforcement personnel (6.1 hours per day). For those local governments that may wish to use the “tour of duty” option, the maximum number of allowable hours in work periods of particular lengths before overtime compensation must be paid to public safety personnel for additional hours have been calculated in
the following table:

<table>
<thead>
<tr>
<th>Work Period (days)</th>
<th>Maximum Hours</th>
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<tbody>
<tr>
<td></td>
<td>Fire</td>
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<tr>
<td>28</td>
<td>212</td>
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<td>27</td>
<td>204</td>
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<td>8</td>
<td>61</td>
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<tr>
<td>7</td>
<td>53</td>
</tr>
</tbody>
</table>

A firefighter or law enforcement officer may perform work that is not related to fire protection or law enforcement activities. However, if more than 20 percent of an employee’s work hours are spent on unrelated activities, the employee cannot qualify for use of the tour of duty rules and would therefore have to be paid overtime on a time and one-half basis for any hours worked in excess of 40 hours in a seven-day period.

Public agency fire protection and law enforcement personnel may, at their own option, undertake employment for the same employer on an occasional or sporadic and part-time basis in a different capacity from their regular employment. The performance of such work does not affect the application of the special rule with respect to the regular employment. In addition, the hours of work in the different capacity need not be counted as hours worked for overtime purposes on the regular job, nor are such hours counted in determining the 20 percent limitation for non-exempt work. In order to qualify, the work must not be regularly scheduled. This special rule is narrowly construed by the DOL, and an employer must be careful to thoroughly examine the regulations found at 29 C.F.R. § 553.30 before relying on this rule.

**Sleep Time under § 7(k)**

Reference Number: CTAS-977

For firefighters and law enforcement personnel using the § 7(k) rules, there is one sleep time rule
for employees on duty for 24 hours or less, and another for those who work a shift of more than 24 hours. If an employee’s shift is 24 hours or less, all of the time is considered work time and there is no sleep time exclusion; allowing employees to sleep when they are not busy does not render the time to be non-compensable sleep time, nor does the furnishing of facilities to sleep, as long as an employee is still on duty.

When an employee’s shift is longer than 24 hours, up to eight hours of sleeping time can be excluded from compensable working time if:

1. An expressed or implied agreement excluding sleeping time exists; and
2. Adequate sleeping facilities for an uninterrupted night’s sleep are provided; and
3. At least five hours of sleep is possible during scheduled sleep periods; and
4. Interruptions to perform duties are considered hours worked.

If the employee does not get at least five hours of sleep time during the scheduled sleeping period, the entire time is hours worked. The five hours of sleep time need not be five continuous, uninterrupted hours of sleep. However, if interruptions during the sleep period are so frequent as to prevent reasonable periods of sleep totaling at least five hours, the entire period would be considered hours worked. No more than eight hours of sleeping time may be excluded from hours worked in any 24-hour period. There must be an advance agreement with the employee, and sleeping facilities must be furnished. The regulations applicable to § 7(k) employees appear at 29 C.F.R. § 553.222, and refer to the regulations at 29 C.F.R. § 785.22.

Outside Employment

Reference Number: CTAS-978

There is a special provision for fire protection and law enforcement employees who, solely at their own option, perform special duty work in fire protection, law enforcement or related activities for a separate and independent employer (public or private) during their off-duty hours, such as a sheriff’s deputy working a funeral. These special detail assignments may be performed for the second employer without FLSA overtime obligations applying even if the county selects a particular police officer for the assignment from a list of officers who wish to perform the work, negotiates the fee, compensates the officer for the special detail work through the county’s regular payroll system, or retains a fee for administrative expenses. However, the officer must perform the work at his or her option; the special detail exception will not apply if the employer directs the officer to perform the outside work. The two employers must also, in fact, be separate. Special detail assignments are exceptions to the general FLSA rules which, in the absence of the statutory exception, would define such arrangements as joint employment relationships and treat the two jobs as one job for purposes of the overtime provisions of the FLSA. \[1\]

\[1\] See 29 C.F.R. § 553.227.

Interrelationship with Other Exemptions

Reference Number: CTAS-979

Employees in fire protection and law enforcement activities also may be exempt as bona fide executive, administrative or professional employees, as those terms are defined and delimited. However, the election to take such an exemption for an employee who qualifies for it will not result in excluding that employee from the count that must be made to determine the application of the exemption for public safety agencies having five or fewer employees.

Hospital and Nursing Home Employees

Reference Number: CTAS-980

Under § 7(j) of the FLSA, hospitals and residential care establishments, may, pursuant to a prior agreement or understanding with their employees, utilize a fixed work period of 14 consecutive days in lieu of the seven-day workweek for the purpose of computing overtime, if they pay time and one-half the regular rate for hours worked over eight in any work day or 80 in the fourteen
day period, whichever provides the greater number of overtime hours. This rule is almost never used in practice, however, because it rarely results in a savings to the employer.

Compensable Hours

Reference Number: CTAS-981

Compensable time refers to the hours of work for which an employee must be paid under the FLSA. This topic is covered in the regulations found at 29 C.F.R. part 785. Compensable hours of work include all times during which the employee is on duty or on the employer’s premises available for work or time spent away from the employer’s premises under conditions that prevent the employee from using the time for personal activities. The concept of “hours worked” is a crucial determining factor in complying with the FLSA. An employee must be compensated for “all time spent in physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.” *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U. S. 590 (1944). Employees who, even though voluntarily, continue to work after their shift is over are engaged in compensable working time. The reason for the work is immaterial; as long as the employer “suffers or permits” employees to work on its behalf, proper compensation must be paid. Management must make certain that overtime work it does not want performed is not in fact performed. Mere promulgation of a rule to that effect is not sufficient to avoid compensation for additional hours worked.

Work not requested or required by the employer but allowed or permitted is work time under the FLSA. This rule also applies to work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that work is being performed, the work must be counted as hours worked.

In an Opinion Letter dated August 11, 1993 (FLSA-1112), the DOL stated that training and care of a police dog at home by a canine patrol officer is considered part of the officer's principal activities and is therefore compensable work time under the FLSA. However, DOL noted that this kind of work does not necessarily have to be compensated at the same rate of pay as paid for law enforcement activities, and that the employer and employee can work out a reasonable agreement as to compensable hours worked at home.

Sleep Time

Reference Number: CTAS-982

There are two different rules applicable to sleep time, one for firefighters and law enforcement personnel under the § 7(k) exemption,[1] and one for all other employees.[2] The rules governing sleep time for all other employees differ from the rules for firefighters and law enforcement personnel under the § 7(k) exemption only with respect to employees whose shifts are exactly 24 hours – sleep time may be excluded from hours worked by employees whose shift is exactly 24 hours and who are not under the § 7(k) exemption. All other requirements for exclusion of sleep time are the same as those for public safety employees under the § 7(k) exemption.


On Call Time

Reference Number: CTAS-983

Whether or not the time an employee is on call must be counted as compensable working time depends upon the employee’s freedom while on call. If an employee is required to remain on call on the employer’s premises or so close that he or she cannot use the time effectively for personal purposes, the employee is working while “on call.” An employee who is not required to remain on the employer’s premises and is free to engage in his or her own pursuits, subject only to the understanding that the employee leave word at his or her home or with the employer where he or she can be reached by the employer, is not working while “on call.” When an employee is called out on the job assignment, only the time spent making the call is counted as hours worked. Of
course, if calls are so frequent or the readiness conditions are so restrictive that the employee is not really free to use the intervening periods effectively for his or her own benefit, the employee may be considered as “engaged to wait” rather than “waiting to be engaged.”

An employee who is “on call” may be required to remain at home to receive telephone calls when the employer’s office is closed. If the employee is uninterrupted for long periods of time, any reasonable agreement of the parties for determining the number of hours worked will be accepted. The agreement should take into account not only actual time spent in answering the calls, but also some allowance for the restriction on the employee’s freedom to engage in personal activities resulting from the duty of answering the telephone.

Waiting Time

Reference Number: CTAS-984

Whether waiting time is compensable depends on the particular factual circumstances.[1] The FLSA requires compensation for all time during which employees are required to wait while on duty even if allowed to leave the job site. The FLSA requires compensation because these waiting periods are of such short duration that the employees cannot use them for their own benefit. Employees who wait before starting their duties because they arrived at the place of employment earlier than the required time are not entitled to be paid for the waiting time. However, if an employee reports at the required time and then waits because there is no work to start on, the waiting time is compensable work time. Waiting by an employee who has been relieved from duty need not be counted as hours worked, if:

1. The employee is completely relieved from duty and allowed to leave his or her job; or
2. The employee is told he or she is relieved until a definite specified time; or
3. The relief period is long enough for the employee to use the time as he or she sees fit depending upon the circumstances in each case.

Whether waiting time is time worked under the FLSA depends upon the particular circumstances. A stenographer who reads a book while waiting for dictation, firefighters who watch television while waiting for alarms and police officers who are required to wait at home to be summoned to court are all working during their periods of inactivity. Generally, periods during which an employee is completely relieved from duty and which are long enough to enable the employee to use the time effectively for his or her own purposes are not hours worked.


Show-up, Call-in, Roll Call or Reporting Time

Reference Number: CTAS-985

If an employee is required to wait ten or fifteen minutes before being advised that no work is available, this time is compensable.

Stand-By Time

Reference Number: CTAS-986

Workers who are required to stand by their posts ready for duty, whether during lunch periods, during machinery breakdowns, or during other temporary work shut-downs, must be paid for this time. Such periods of time are usually of short duration and their occurrence is not predictable. Since the employee is controlled by the employer during these periods, and is not able to use the time for his or her own purposes, this is working time.

Meal Periods

Reference Number: CTAS-988

Meal time when the employee is completely relieved from duty is not work time. For an employee’s meal periods to be excluded from compensable working time:
1. The meal period generally must be at least 30 minutes; and
2. The employee must be completely relieved of all duties (if the employee must sit at a desk and incidentally answer the telephone, for example, this would be compensable time); and
3. The employee must be free to leave his or her duty post. However, there is no requirement that the employee be allowed to leave the premises or work site.

All voluntary work done during meal periods must be counted as compensable working time if the employer knows or has reason to believe work is being performed. Meal time spent out of town on business trips is generally not compensable time. Of course, if an employee works during the meal, such time is compensable.

A special meal time rule applies to law enforcement personnel using the special § 7(k) exemption. Under these circumstances, the county may exclude meal time from hours worked on tours of duty of 24 hours or less, provided that the employee is completely relieved from duty during the meal period, and all the other tests are met. On the other hand, where law enforcement personnel are required to remain on call in barracks or similar quarters, or are engaged in extended surveillance activities (e.g., "stakeouts"), they are not considered to be completely relieved from duty, and any such meal periods would be compensable.

With respect to firefighters employed under the § 7(k) exemption, who are confined to a duty station, meal time cannot be excluded from the compensable hours of work where (1) the firefighter is on a tour of duty of less than 24 hours, or (2) the firefighter is on a tour of duty of exactly 24 hours. In the case of police officers or firefighters who are on a tour of duty of more than 24 hours, meal time may be excluded from compensable hours of work provided that the regular tests are met and the employer and employees agree.

**Rest Periods or Breaks**

Reference Number: CTAS-987
The FLSA does not require that employees be given rest periods or breaks, but if rest periods are provided, they must be counted as hours worked. Coffee and snack breaks are compensable rest periods and cannot be excluded from hours worked as meal periods. Periods of greater than 30 minutes might become meal periods or off time, and if so could be excluded from compensable time.

**Training Time**

Reference Number: CTAS-989
The rules governing compensability of training time\[1\] for employees are often confusing. The general rule is that attendance at lectures, meetings, training programs, and similar activities must be considered working time unless the following four requirements are met:

1. Attendance is outside the employee's regular working hours;
2. Attendance is voluntary;
3. The course, lecture, or meeting is not directly related to the employee’s job; and
4. The employee does no productive work while attending.\[2\]

Attendance is not voluntary if it is required by the employer or if the employee is led to believe that his employment would be adversely affected if he does not attend.\[3\] Training is considered to be directly related to the employee's job if it is designed to help the employee perform his present job more effectively. On the other hand, training to learn a new job or an additional job skill or training for the purpose of advancement to another position is not considered directly related to the employee's job, even though it may incidentally improve the employee's skill in doing his regular job.\[4\] There is an exception to the requirement that an employee be paid for training directly related to the employee's job – if an employee on his own initiative voluntarily attends a public school or takes training in an employer-sponsored on-the-job training program outside working hours, the time is not considered hours worked even if the courses are job related.\[5\]

Questions about employee training often arise in the context of firefighters and law enforcement
officers. The regulations are reasonably clear that when firefighters and law enforcement officers attend training at a bona fide fire or police academy or other training facility that is required by the employing agency, the time is compensable. However, it is only the time actually spent in classes or training that is compensable time; law enforcement officers or firefighters who are in attendance at a police or fire academy or other training facility are not considered to be on duty during those times when they are not in class or at a training session if they are free to use their time for personal pursuits.[6]

With regard to non-required training for law enforcement officers, in a letter dated January 2, 1987, the DOL addressed a question concerning the compensability of work-related training sessions for police officers. The police officers attended state-certified training programs on a voluntary basis, sometimes during scheduled shifts and sometimes on their days off. The topics covered at these sessions included fingerprint analysis, accident investigation techniques, high-speed pursuit driving techniques and other law enforcement related training. The DOL noted that these training sessions are not compensable working hours only if the following criteria are met:

1. Participation in the training is outside the employee’s regular working hours;
2. Participation is in fact voluntary;
3. The training is not directly related to the employee’s job; and
4. The employee does not perform any productive work during such participation.

The DOL found that the first criterion was not met in some instances and the third criterion was not met at all. The training sessions were directly related to the employee’s job, according to DOL. Therefore, the hours attending the police training sessions were compensable working hours, whether attendance was on a work day or not. Since the training program was work related, all hours of attendance were compensable under the FLSA.

In a Wage and Hour Opinion Letter dated February 16, 2001, the DOL was asked to address whether corrections deputies who “ride along” with road patrol deputies to gain experience for advancement opportunities must be paid for their time. The DOL found that because the deputies were providing hands-on assistance to the patrol deputies in the form of assistance in searching for weapons, handcuffing, etc., the fourth requirement that the employee not perform any productive work was not met and the time was compensable.

Finally, there are regulations setting out special situations in which employees of state and local governments do not have to be compensated for training time. These regulations state that while time spent attending training required by the employer is normally considered compensable time, state and local government employees do not have to be compensated for time spent in training under the following limited circumstances:

1. Attendance outside of regular working hours at specialized or follow-up training, that is required by law for certification of public and private sector employees within a particular governmental jurisdiction (e.g., certification of public and private emergency rescue workers), does not constitute compensable hours of work for public employees within that jurisdiction and subordinate jurisdictions.
2. Attendance outside of regular working hours at specialized or follow-up training, that is required for certification of employees of a governmental jurisdiction by law of a higher level of government (e.g., where a state or county law imposes a training obligation on city employees), does not constitute compensable hours of work.
3. Time spent in the training described in 1 and 2 above is not compensable, even if all or part of the cost of the training is borne by the employer.[7]

The intent of the foregoing regulation is far from clear, but in an Opinion Letter dated September 30, 1999, the DOL found that this regulation allows a law enforcement agency to deny compensation for time spent on tests for promotion administered to law enforcement officers by the civil service board. The tests were required by the state for an officer to become a commissioned police officer, they were voluntarily taken, and they occurred outside the regular hours of work.

The regulations discussed above are confusing, and the opinion letters interpreting them are not
always consistent. In situations where it is not clear whether payment for attendance at training sessions is required under the regulations, it may be best to remember that an employer may choose to pay for training time even when it is not required by the FLSA. Before denying compensation for attendance at job-related training, the employer should discuss the matter with the county attorney.

[1] Training for current employees should be distinguished from true trainees who have not yet been employed and who may be excluded from coverage under the FLSA if all of the following six conditions are met: (1) the training is similar to that which would be given in a vocational school; (2) the training is for the benefit of the trainees; (3) the trainees do not displace regular employees but work under close observation; (4) the employer providing the training derives no immediate advantage from the activities of the trainees and on occasion his operations may actually be impeded; (5) the trainees are not necessarily entitled to a job at the completion of the training period; and (6) the employer and the trainees understand that the trainees are not entitled to wages for the time spent in training. See Wage and Hour Opinion Letter dated Jan. 6, 1969. This type of arrangement is rarely encountered in county government.

[6] 29 C.F.R. §§ 553.214 and 553.226(c). A law enforcement agency may be able to enter into an agreement allowing it to recoup some of the cost of training a new officer if he or she leaves employment within a specified time after training as long as certain conditions are met, including not reducing the officer’s pay below minimum wage or reducing overtime payments for earned overtime. See Heder v. City of Two Rivers, 295 F.3d 777 (7th Cir. 2002); Wage and Hour Opinion Letter FLSA2005-18 (May 31, 2005).

Travel Time

Reference Number: CTAS-990

Whether travel time is compensable depends entirely on the kind of travel involved. The regulations governing travel time are found at 29 C.F.R. § 785.33 et seq. The employer generally is not responsible for time spent by the employee in traveling to the place of principal activity (home-to-work). This rule is true even if the employer provides transportation. Traveling by an employee from one job site to another job site during the work day is compensable work. Also, traveling from an outlying job at the end of the scheduled work day to the employer’s premises is compensable.

Generally, an employee is not at work until he or she reaches the work site. But if an employee is required to report to a meeting place to pick up materials, equipment, or other employees, or to receive instructions, before traveling to the work site, compensable time starts at the time of the meeting. Also, when an employee is called back to work after going home for the day, the travel time to the job site is considered compensable.

When an employee who regularly works at a fixed location in one city is given a special one-day work assignment in another city, travel requires special consideration. For example, an employee who works in Nashville with regular working hours from 8 a.m. to 4:30 p.m. may be given a special assignment in Knoxville with instructions to leave Nashville at 7 a.m. The employee arrives in Knoxville three hours later ready for work. The special assignment is completed three hours later, and the employee arrives back in Nashville at 6:30 p.m. Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer’s benefit and at the employer’s special request to meet the needs of the particular and unusual assignment. It would thus qualify as an integral part of the principal activity that the employee was hired to perform on the work day in question. However, if the employee took an
airplane to Knoxville, the travel to the airport could be treated like regular home-to-work travel since it is in the same city. Also, of course, the usual meal time would be deductible.

Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee’s work day. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on non-working days. Thus, if an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday, the travel time during these hours is work time on Saturday and Sunday as well as on the other days. Regular meal period time is not counted. As an enforcement policy the DOL will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger, on an airplane, train, boat, bus or automobile.

Any work that an employee is required to perform while traveling must, of course, be counted as hours worked. An employee who drives a truck, bus, automobile, boat or airplane, or an employee who is required to ride therein as an assistant or helper, is working while riding, except during bona fide meal periods or when the employee is permitted to sleep in adequate facilities furnished by the employer.

**De Minimis Time**

Reference Number: CTAS-991

The courts and the DOL have recognized that insubstantial or insignificant periods of time outside scheduled working hours may be disregarded in recording working time. This rule applies, however, only where a few minutes of work are involved and where the failure to count such time is due to rounding off practices or considerations justified by operational realities. Such time is considered de minimis, i.e., minor or trivial. Counties rely on this exclusion at their peril.[1]


**Compensatory Time**

Reference Number: CTAS-993

Public employers are allowed to give an employee compensatory (“comp”) time off in lieu of cash payment for overtime worked.[1] Comp time accrues at the rate of one and one-half hours for each hour of overtime worked. A county may provide comp time instead of cash for overtime as long as an agreement or understanding with the employee (or a regular practice or policy in place prior to April 15, 1986) has been reached prior to the performance of the work. The FLSA does not require a written agreement with each employee; a notice or written policy can be used.[2]

Different agreements can be reached with different employees. The agreement may take the form of a condition of employment so long as the employee knowingly and voluntarily agrees to it as a condition of employment. A statement may be placed on the employment application advising applicants that the county gives compensatory time off in lieu of cash payment for overtime worked and stating that acceptance of employment with the county constitutes the employee’s agreement to accept comp time.

If a notice or written policy is used, an agreement or understanding will be presumed to exist for any employee who fails to express to the employer an unwillingness to accept comp time off in lieu of overtime pay. However, the employee’s decision must be freely made without coercion or pressure. An agreement can restrict the taking of comp time to only certain hours of work and can provide for the use of a combination cash payment and comp time so long as the time and one-half principle is followed. Further provisions concerning preservation, use and cashing out comp time can be included. The regulations governing comp time are found at 29 C.F.R. § 553.21 et seq.

Sample Compensatory Time Agreement

[1] The regulations governing compensatory time are found at 29 C.F.R. § 553.20 et seq.
For public employers, state law requires either a written compensatory time policy or a statement that comp time is not allowed. T.C.A. § 5-23-104.

**Accrual of Comp Time**

Reference Number: CTAS-994

Compensatory time accrues at the rate of one and one-half hours of compensatory time off for each hour of overtime worked. Employees in public safety, emergency response or seasonal activities may accrue up to 480 hours, which represents 320 hours of actual overtime worked. Other employees may accrue up to 240 hours, which represents 160 hours of actual overtime worked.\(^1\) Cash can always be used to compensate for overtime at the employer’s option.\(^2\)

\(^{1}\) 29 C.F.R. §§ 553.21, 553.22, and 553.24.


**Use of Comp Time**

Reference Number: CTAS-995

Comp time cannot be used as a means of avoiding statutory overtime pay. An employee has the right to use accrued comp time, and must not be coerced to accept more comp time than an employer can realistically and in good faith expect to be able to grant within a reasonable period of a request for use of such time. An employee must be permitted to use accrued comp time within a reasonable period after making the request, as long as it does not unduly disrupt the workplace.\(^1\)

What is a reasonable period will be determined by considering the customary work practices based on case by case facts and circumstances, including:

1. Normal work schedule,
2. Anticipated peak workloads based on past experience,
3. Emergency requirements for staff and services, and
4. Availability of a qualified substitute staff.

To the extent the conditions are contained in an agreement or understanding, such can interpret what constitutes a “reasonable period.”

Being unduly disruptive means more than mere inconvenience to the employer. The employer, in order to turn down a comp time request made within a reasonable period of time, must reasonably and in good faith anticipate that it would impose an unreasonable burden on the employer’s ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee’s services.

Also, the employer may require employees to use their compensatory time. The U. S. Supreme Court has determined that the FLSA does not prohibit the practice of forcing employees to use accrued comp time.\(^2\)

In a workweek or work period during which an employee works overtime hours for which cash overtime payment will be made, and the employee also takes compensatory time off, the payment for such comp time may be excluded from the employee's regular rate of pay for overtime purposes.\(^3\)

\(^{1}\) 29 C.F.R. § 553.25. The Sixth Circuit Court of Appeals has held that having to pay other employees overtime in order to allow someone to take banked comp time does not cause an “undue disruption” unless the parties have entered into an express agreement, such as a collective bargaining agreement, which allows financial considerations to be used to deny the use of comp


**Payment for Accrued Comp Time**

Reference Number: CTAS-996

The FLSA permits an employer to “cash out” an employee’s accrued comp time at any time by paying the employee cash for the unused comp time. These payments are to be made at the regular rate of pay the employee was receiving at the time the payment is made.[1]

Upon termination of employment, an employee with banked comp time must be paid for the banked comp time at the higher of:

1. The average rate received by the employee during the last three (3) years of employment, or
2. The final regular rate of pay.

The “last three (3) years of employment” means immediately prior to termination. If there is a break in service, the period of employment after the break is treated as a new period of service (so long as it was intended as permanent during the break, and accrued comp time was cashed out). Where the final period of service was less than three (3) years, the rate is calculated based on the rate in effect during the final period of service.[2]


**Non-FLSA Comp Time**

Reference Number: CTAS-997

Employers sometimes grant employees compensatory time off under circumstances where it is not required under the FLSA, such as when an employee works on a holiday even though the employee has worked no overtime in the workweek and the employer grants the employee another day off. This is considered “other” compensatory time. As long as this time is recorded separately from FLSA comp time, this “other” comp time is not subject to the requirements applicable to FLSA comp time such as the 240 (or 480) hour limit, or the requirement that it be earned at one and one-half times the regular rate.[1]


**Substitution**

Reference Number: CTAS-998

Employees, solely at their own option and with the approval of their employer, may substitute for one another during scheduled work hours in performance of work in the same capacity. The regulations on this topic are found at 29 C.F.R. §§553.31. The hours worked are excluded by the employer in the calculation of the hours the substituting employee would be considered as having worked for FLSA purposes. In other words, each employee will be treated as if he or she worked their normal work schedule. For example: When Officer B substitutes eight hours for Officer A, recordkeeping of Officer B’s time worked is credited toward Officer A’s work period. Officer A now “owes” Officer B eight hours of working time. Officer A can repay that debt by substituting for Officer B.
A DOL opinion letter dated January 2, 1987, addressed the issue of overtime compensation where police officers trade or substitute time with one another and whether it would be permissible for an officer to have part of the officer's accrued comp time hours transferred to another officer’s comp time as repayment for trading time. Such a transfer would not be permissible under the regulations because it would require the employer to maintain a separate recordkeeping system, which is specifically not required by the FLSA. However, DOL states the same result could be permissibly obtained under the following scenario: Officer A may pay back Officer B by using Officer A’s own accrued compensatory time while substituting the appropriate number of hours for Officer B. Thus, both officers would receive pay for the time worked, Officer A would not have to work those eight hours, and Officer B’s accrued comp time balance would be reduced by eight hours.

Paying back the time is a matter left to the police officers who traded with one another. There is nothing under the FLSA that specifies the period for repayment of the time substituted or stipulates the number of trades allowed.

**Child Labor Provisions**

Reference Number: CTAS-999

The FLSA child labor provisions are designed to protect the educational opportunities of minors and prohibit their employment in jobs and under conditions detrimental to their health or well-being. These provisions include lists of hazardous occupations for jobs declared to be too dangerous for minors to perform. Additional information on child labor provisions is available from local Wage and Hour Division offices.

**Records to be Kept by Employers**

Reference Number: CTAS-1000

Employers are required to keep certain records in order to comply with the FLSA, as prescribed in 29 C.F.R. § 516. No particular order or format is required, but specified data and information must be kept for each employee who is subject to, and not exempt from, the FLSA’s minimum wage and overtime provisions, as follows:

1. Name in full (as used for social security purposes) and the employee’s identifying symbol or number if such is used in place of a name on any payroll records;
2. Home address, including zip code;
3. Date of birth, if under 19;
4. Sex and occupation;
5. Time of day and day of week on which the employee’s workweek begins (if all workers have the same workweek beginning at the same time of day, a single notation for the whole work force may be used; if any employee or group of employees has a workweek beginning and ending at a different time, a separate notation may be kept for that employee or group);
6. (a) Regular hourly rate of pay for any week when overtime is worked or overtime compensation is due, (b) basis on which the employee’s wages are paid (such as $12.00 per hour; $480 per week), and (c) amount and nature of each payment that is excluded from the regular rate;
7. Hours worked for each work day and the total hours worked for each workweek (with respect to employees on fixed schedules, the employer may maintain records showing the schedule of daily and weekly hours the employee normally works, and, in weeks when an employee adheres to such schedule, indicate by check mark, statement or other method such were the hours actually worked; in weeks in which more or less than the scheduled hours are worked, the exact number of hours worked each day and each week must be shown; as a practical matter, it is recommended that employee’s and immediate supervisor’s signatures be used instead of using check marks, as such would be better evidence should the records be relied on in an investigation by the Wage and Hour Division);
8. Total daily or weekly straight-time earnings (including that earned during overtime, but excluding overtime excess compensation);
9. Total overtime excess compensation;
10. Total additions to or deductions from wages paid each pay period, with a record, for each employee, of the dates, amounts, and nature of each such item;
11. Total wages paid each pay period; and
12. Date of payment and the pay period covered by each payment.

With respect to bona fide executive, administrative or professional employees (including academic administrative personnel or teachers in elementary or secondary schools), items six through 10 are not required. However, records must be maintained to reflect the basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee’s total remuneration, including fringe benefits and definitional prerequisites. This may be shown as a monthly or weekly amount with appropriate addenda such as “two weeks paid vacation,” “plus hospitalization and insurance plan A,” etc.

Additional records that must be kept for counties using comp time include:

1. Number of comp time hours earned each workweek (or work period) at the rate of time and one-half for each overtime hour worked;
2. Number of comp time hours used each workweek (or work period) by each employee;
3. Number of comp time hours compensated in cash, the total amount paid and the date of such payment; and
4. Any agreement or understanding with respect to earning and using comp time off, or if not in writing, a record of the existence of such an understanding.

For police and fire personnel using the §7(k) rules, notation is required on the payroll records showing the work period for each employee, the length of that period and its starting time. If all workers (or a group of workers) have the same length, beginning at the same time on the same day, a single notation of the time of day and beginning day of the work period will suffice for these workers.

The following records must be kept for at least three years:

1. Payroll records containing the above required information (from the last date of entry);
2. Collective bargaining agreements (with amendments and additions), benefit plans, trusts, employment contracts (when such are oral, written memoranda summarizing such agreements), certificates and notices; and
3. Total volume sales and purchase records, as maintained in the ordinary course of business.

These records must be maintained for at least two years:

1. Basic employment and earnings records, including all basic time and earning cards or sheets on which are entered the daily starting and stopping time of individual employees, or of separate work forces;
2. Wage rate tables, including all tables or schedules of the employer that provide rates used in computing straight-time earnings, wages or salary, or overtime compensation, from their last effective date; and
3. Records of additions to or deductions from wages paid (from the date of last entry).

All records must be kept safe and accessible at the place or places of employment or at one or more established central recordkeeping offices where such records are customarily maintained, must be made available within 72 hours following notice from the administrator of the DOL, and must be open at any time to inspection and transcription by the administrator.

From time to time, notices prescribed by the Wage and Hour Division must be posted and kept posted in conspicuous places in every establishment where employees work so as to permit them to read notices on the way to or from their place of employment. An establishment must display the FLSA poster where the employees may readily see it. This poster briefly outlines the FLSA’s basic requirements, and may be obtained free of charge from the nearest office of the Wage and Hour Division, or copies can be downloaded from the DOL Web site. The DOL will not automatically
send these posters to you. It is up to the county to contact the DOL to obtain a poster.

Employers also may be required to submit reports that the DOL determines are needed to carry out its enforcement duties, and DOL may enter and inspect places of employment to determine whether the FLSA has been violated.

**Enforcement and Penalties**

Reference Number: CTAS-1001

Employees can sue their employers for back wages and liquidated damages (equal to the amount of back wages), together with attorneys’ fees, costs, and other appropriate relief such as promotions and reinstatement, for violations of the FLSA. The Secretary of Labor also can bring a lawsuit on the employee’s behalf for back wages and either liquidated damages or an injunction prohibiting the employer from committing further violations of the Act.

The DOL also can institute criminal prosecution for willful violations of the Act. Employers who willfully violate the minimum wage or overtime provisions of FLSA may be fined up to $10,000, and if the employer has been convicted on a prior occasion may also be imprisoned up to six months. See 29 U.S.C. § 216. The statute of limitations is five years for criminal violations under the FLSA.

In addition to criminal penalties, the DOL is authorized to impose civil monetary penalties for repeated or willful violations of the FLSA. A penalty of up to $1,330 per violation may be imposed for violations of the minimum wage or overtime provisions of the act. A penalty of up to $2,374 per violation may be assessed against any person who repeatedly or willfully violates the act. A violation is considered “repeated” if the employer has previously received notice of a violation of the act. A violation is considered “willful” where the employer either knew the conduct violated the act or showed reckless disregard for the requirements of the act, such as situations in which the employer should have inquired further into whether the conduct violated the act. 29 C.F.R. § 578.3.

Under the child labor provisions of the act, an employer can be fined up to $15,138 per child labor violation. If the violation causes death or serious injury to an employee under the age of 18, the maximum penalty is $68,801 and if that violation is repeated or willful the maximum goes up to $137,602. 29 C.F.R. § 579.1.

An employer is prohibited from retaliating against an employee for filing a complaint or otherwise participating in an FLSA proceeding.

**Definitions**

Reference Number: CTAS-1002

- **Employ**: to suffer or permit to work.
- **Employer**: any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency.
- **Public Agencies**: includes counties and cities.
- **Employees**: as defined in cases of public agencies, means all individuals employed by such public agency other than an employee who is: not subject to civil service laws of the state, political subdivision, or agency employing the individual and who holds a public elective office of that state, political subdivision or agency, is selected by the holder of such an office to be a member of his or her personal staff, is appointed by such officeholder to serve on a policymaking level or, is an immediate advisor to such officeholder concerning the constitutional or legal powers of his or her office.
- **Firefighters**: employees of an organized fire department who have been trained to the extent legally required, and have responsibility for the prevention, control or extinguishment of fires and who perform activities required for incidental functions, such as housekeeping, equipment maintenance, and inspections.
- **Law Enforcement Personnel**: members of a body of officers (uniformed and plain-clothed) who are empowered to enforce laws to maintain public peace or protect property from accidental or willful injury and to prevent and detect crimes, have the power of arrest and have undergone or are undergoing on-the-job training or a course of instruction that typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, communi-
ty relations, medical aid and ethics, and may include security personnel in correction institutions and jails. Not covered by this term are civilian dispatchers, parking checkers, health inspectors, clerical support staff and building guards.

Workweek

A regularly recurring period of 168 hours in the form of seven consecutive 24-hour periods. The workweek need not be the same as the calendar week and may begin on any day of the week and at any hour of the day. Once established, a workweek may not be changed unless the change is intended to be permanent.

Compensable Hours

During which the employee is on duty, including time spent away from the employer’s premises under conditions that do not permit the employee time for personal activities and in some circumstances may include sleep time, meal time, on call time and training time.

In general, includes all the time an employee is required to be on duty, on the employer’s premises or at a prescribed workplace and all time when the employee is suffered or permitted to work for the employer, and will include extra work, even if performed at home and even if the employee failed to work properly all day, if the employer has knowledge the person is working extra.

Sick leave, vacation and holidays are not counted as hours worked.

Wage

Compensation paid to an employee. Effective July 24, 2009, $7.25 per hour worked.

Minimum Wage

With regard to law enforcement and fire protection activities with an established work period of at least seven days and up to 28 consecutive days, the number of hours such employee is engaged in work activities.

Regular Rate of Pay

The rate per hour paid for normal non-overtime work. Gifts, payments for vacation, holidays, illness, traveling expenses in furtherance of the employer’s business, retirement, life, accident, health and similar benefits are not included. For salaried employees, divide the regular weekly salary by the number of hours in the employee’s regular workweek. The regular rate may be more than the statutory minimum wage but it cannot be less (except for employment under subminimum wage certificates pursuant to section 14 of FLSA). The regular rate includes all remuneration for employment paid to an employee such as commissions, shift differentials, and other payments for work actually performed, including the cost of any facilities furnished to an employee.

Overtime

As a general rule, all hours over 40 worked in a particular workweek for which the law requires the employee be compensated at a rate not less than one and one-half times the employee’s regular rate.

Compensatory hours of work compensated by not working (having time off) during another regular working period (“Comp”) Time od.

Volunteer

An individual who performs work on a volunteer basis (without any express or implied compensation agreement) who may be paid expenses or a nominal compensation.

Oppressive Child Labor

A condition of employment under which any employee under the age of 16 is employed by an employer (other than a parent or person standing in place of a parent) and his or her own child or a child in his or her custody under the age of 16 years in an occupation other than manufacturing or mining or an occupation found by the DOL to be particularly hazardous for the employment of children between the ages of 16 and 18 years or detrimental to their health or well-being) in any occupation, or any employee between the ages of 16 and 18 years is employed by an employer in any occupation that the DOL finds and by order declares to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the DOL certifying that such person is above the oppressive child labor age. The employment of employees between the ages of 14 and 16 years in occupations other than manufacturing and mining is not deemed to constitute oppressive child labor if and to the extent that the DOL determines that such employment is confined to periods that will not interfere with their schooling and to conditions that will not interfere with their health and well-being.

Family and Medical Leave Act (FMLA)

Reference Number: CTAS-173

The federal Family and Medical Leave Act (FMLA) became effective on August 5, 1993. The FMLA was amended in 2008 to include new military family leave entitlements. It is administered by the U. S. Department of Labor (DOL), Wage and Hour Division. The DOL enacted final regulations
implementing the FMLA in 1995, and extensively revised the regulations effective January 2009.

The FMLA requires employers to allow eligible employees to take a certain minimum amount of
job-protected unpaid leave, or to substitute appropriate paid leave if the employee has earned or
accrued it, for specified family and medical reasons.

All counties and cities are covered by the FMLA, regardless of the number of employees. A county
or a city is generally considered to be a single employer.

Both male and female employees who have worked at least 12 months for the employer, and who
have worked at least 1,250 hours during the preceding 12-month period, are eligible for leave
under the act. Special rules apply when a husband and wife are employed by the same employer,
for highly compensated employees, and for local educational agencies. Employee has the same
meaning as under the FLSA, so persons who are covered by the FLSA (even if they are “exempt”) are
covered by the FMLA. Persons who are not covered include elected officials, political
appointees, volunteers, independent contractors and legal advisors.

Under the basic leave entitlement, qualified employees are entitled to a total of 12 workweeks of
unpaid leave during a 12-month period for the following reasons:

(a) The birth of a son or daughter, and to care for the newborn.
(b) The placement of an adopted or foster son or daughter, and care afterwards.
(c) To care for spouse, son, daughter or parent with serious health condition.
(d) For the employee’s own serious health condition that makes the employee unable to
perform the functions of the employee’s job.

The 2008 FMLA amendments added two new military family leave entitlements. The first provision
allows an eligible employee with a spouse, son, daughter, or parent who is serving on active duty
or is called to active duty in a foreign country to use FMLA leave for a “qualifying exigency,” which
may include attending certain military events, arranging for child care, making financial and legal
arrangements, attending counseling sessions, and attending post-deployment reintegration
briefings.

The second provision allows an eligible employee to take up to 26 workweeks of leave during a
"single 12-month period" to care for a spouse, son, daughter, or parent with a serious injury or
illness incurred in the line of duty while serving on active duty. The 12-month period for this type
of FMLA leave begins on the first date the employee takes leave to care for the injured
servicemember and ends 12 months later. If the employee does not take all of the 26 workweeks
during this time, the remainder of the leave is forfeited.

Employees returning to work from FMLA leave must be restored to the same or an equivalent
position (one that has equivalent pay, benefits, duties and responsibilities, and no loss of accrued
benefits).

Health insurance coverage must be maintained under the same conditions as when the employee
is actively at work (i.e., if the employee pays part of the insurance premiums, the employee may
be required to continue paying that portion of the premiums), and must be restored immediately
upon the employee’s return to work, regardless of whether premiums were paid during leave.

Intermittent leave (irregular, e.g., to take periodic medical treatments) is permitted if it is
medically necessary for the employee or for the care of family member. Intermittent leave is not
available to care for a healthy newborn or newly-placed child unless the employer agrees.

Reduced leave (regular reduced number of hours per day or week) is allowed if it is medically
necessary for the employee’s illness or for the care of family member. It is only available by
agreement with the employer to care for a healthy newborn or newly-placed child.

Employees can use paid leave as part of their FMLA entitlement if the employer already provides it
under an established leave plan. However, the FMLA does not require paid leave.

Employers have certain rights under the FMLA. The employer has the right to reasonable advance
notice of an employee’s need to take FMLA leave. At least 30 days advance notice is required for
foreseeable occurrences (birth, adoption, planned medical treatment, etc.); otherwise, as much
notice as is “practicable.” Scheduled medical treatment should be arranged to avoid disruption of
the workplace.
The employer can require medical certifications of the need for leave and the expected dates of the absence, and periodic status reports or re-certification on a reasonable basis. The employer can require a second opinion (at the employer's expense) if the employer has reason to doubt the employee's medical certification, and if the second one is different, the employer can require a third opinion (at the employer's expense). The employer can assign the employee to an “alternative position” if the employee has requested intermittent or reduced leave (with equivalent pay and benefits). The employer can require certification that the employee is able to return to work, pursuant to a uniformly applied policy. The employer can require the employee to repay any health insurance premiums paid by the employer on behalf of the employee if the employee does not return to work (unless the employee is medically unable to return to work). The employer can require the employee to take accrued paid leave as part of the 12 weeks of FMLA leave.

The employer must choose one of the following methods for determining the 12-month period for FMLA leave (except leave to care for an injured servicemember as discussed above): (1) the calendar year; (2) any fixed 12-month period (such as a fiscal year or a year beginning on the employee's anniversary date); (3) the 12-month period measured forward from the date the employee's first leave begins (the employee would be entitled to 12 weeks of leave during the 12 months after leave begins (the next 12-month period would begin the first time the employee requests FMLA leave after completion of the previous 12-month period); or (4) a "rolling" 12-month period counted backward from the date the employee uses any FMLA leave. The employer must choose one of the above methods and that method must be applied consistently to all employees.

During leave, there can be no loss of accrued benefits. Special rules apply for salaried employees who are among the highest paid 10 percent of the employer's employees within a 75-mile radius of the work site; these employees can be denied restoration of employment under certain circumstances. Special rules apply for employees of local educational agencies with regard to the timing of leave.

Coverage under the FMLA

Reference Number: CTAS-1016

Covered Employers. The FMLA only applies to "covered employers" as defined under the act. Public agencies are covered employers, and a county is a public agency under the FMLA. A county is considered a single employer for FMLA purposes. Unlike private employers, coverage is not dependent upon the number of employees employed by the county.

Eligible Employees. Employees must meet certain requirements before they are entitled to protection under the FMLA. An eligible employee is one who (1) has worked for the employer for at least 12 months (this time does not have to be consecutive, but the employer is not required to count previous employment more than seven years before the most recent hire date), (2) has worked at least 1,250 hours during the preceding 12-month period, and (3) is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite (which rarely will be an issue in county government because the county is considered to be a single employer).

"Employee" defined. Under the FMLA, "employee" is given the same meaning as under the Fair Labor Standards Act (FLSA), which means that the FMLA does not cover anyone who is not covered by the FLSA (e.g., elected or appointed officials). However, employees who are covered by the FLSA but fall under an exemption (e.g., executive, administrative and professional employees) are covered under the FMLA.

The 12-month Requirement. The determination of whether an employee has been employed for at least 12 months is made by looking at the time the employee was on the payroll, and not whether the employee was actually physically at work. If an employee is on the payroll for any part of a week, that week is considered a week of employment, and 52 weeks is deemed equal to 12 months. The 12 months of employment need not be consecutive months.

The 1,250-hour Requirement. Unlike the 12-month requirement, the number of hours worked for the 1,250-hour requirement is determined in the same manner as hours worked under the Fair Labor Standards Act—the 1,250 hours are time the employee actually worked; unworked time for
which the employee was paid (paid holidays, leave, etc.) is not counted toward the 1,250-hour requirement.\[7\] For exempt salaried employees for whom the FLSA does not require records of hours worked, the employer has the burden of showing that the employee has not worked at least 1,250 hours during the previous 12-month period in order to claim that these employees are not eligible for FMLA leave. In determining the eligibility of an employee returning from USERRA-covered military service, the employee must be credited with the number of hours the employee would have worked but for the period of military service for purposes of determining whether the 1,250 hour requirement has been met. The employer may use the employee’s pre-service work schedule to determine the hours that would have been worked.\[8\]

The determination whether the employee has been employed at least 12 months and has worked at least 1,250 hours during the immediately preceding 12 months is made as of the date the leave is to begin.\[9\]

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[3] Two exceptions exist: if the break in service was for National Guard or Reserve Duty, or if there was a written agreement to rehire after the break in service. 29 C.F.R. § 825.800.

[4] An exception exists for employees returning from National Guard or Reserve military obligations. These employees must be credited with the hours they would have worked but for the period of military service. 29 C.F.R. § 825.800.


[6] 29 C.F.R. § 825.110(b). However, periods of employment prior to a break in service of seven years or more need not be counted toward the 12-month requirement unless the break in service was occasioned by the fulfillment of the employee’s military service obligation or if there was a written agreement of the employer’s intention to rehire the employee after the break in service.


[8] 29 C.F.R. § 825.110(c).


**Qualifying Reasons for FMLA Leave**

Reference Number: CTAS-1017

Generally, leave under the FMLA falls into one of the following three broad categories:

1. Leave related to birth, adoption and foster care, which includes:
   - (a) leave taken for pregnancy, birth, and to be with the healthy newborn child; and
   - (b) leave taken for the placement of a child for adoption or foster care, and to care for the child after placement.

2. Leave for a serious health condition of the employee or an immediate family member that includes:
   - (a) leave taken to care for spouse, son, daughter or parent with serious health condition; and
   - (b) leave taken for the employee’s own serious health condition that makes the employee unable to perform the functions of the employee’s job.

3. Military-related leave, which includes:
   - (a) qualifying exigency leave, taken for a qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is on covered active duty or has been notified of an impending call to covered active duty; and
(b) military caregiver leave, taken by an employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember to care for the servicemember who has incurred a serious injury or illness in the line of duty on active duty.[1]

The following general definitions apply for all types of FMLA leave:

"Spouse" means a husband or wife as defined or recognized under state law. [2] Tennessee does not recognize common law marriages within this state, but Tennessee courts will recognize a common law marriage contracted in a state where common law marriages are valid. [3] Therefore, "spouse" includes legally married husbands and wives, and persons who are married under the common law of a state that allows common-law marriages.

"Parent" includes biological, adoptive, step or foster parents and persons who stood "in loco parentis" (see definition below) to the employee when the employee was a child. It does not include parents "in law." [4]

"Son/Daughter" includes biological, adopted, and foster children, stepchildren, legal wards, and children of a person standing "in loco parentis"; it includes all children under 18, but does not include children who are over 18 unless they are incapable of self-care because of a mental or physical disability. For military-related leave, the son or daughter can be of any age.

"In Loco Parentis" includes persons with day-to-day responsibilities for the care and financial support of a child, regardless of the existence of any biological or legal relationship. [5]

Additional definitions for military-related FMLA leave are covered in the section on military-related leave.

[1] 29 C.F.R. § 825.112

Leave for Birth, Adoption and Foster Care

Reference Number: CTAS-1018

A father, as well as a mother, can take leave for the birth or placement of a child.[1] This leave must be concluded within the 12-month period beginning with the date of birth or placement of the child. The employer is not required to allow intermittent or reduced leave for the placement of a child unless it is medically necessary.

Pregnancy and Childbirth. [2] Both the mother and father are entitled to FMLA leave for the birth of the child, and to bond with a healthy infant during the 12-month period beginning on the date of birth. The mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth. The incapacity due to pregnancy does not have to meet the other requirements for a serious health condition. For example, the employee may be unable to report to work due to severe morning sickness. The husband is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or if needed to care for her during prenatal care, or to care for her following the birth if the spouse has a serious health condition.

Adoption and Foster Care. [3] For adoption and foster care, leave can begin before the actual placement of a child if it is required for the placement to proceed (for example, required counseling, court appearances and the like). Whether an adoption is through a public or private agency does not matter. The age of the child does not matter. Placement for foster care must involve State action, and does not include informal arrangements.
Leave for Serious Health Condition

Reference Number: CTAS-1019

Eligible employees are entitled to take leave under the FMLA for their own serious health condition that renders them unable to perform the functions of their job, or to care for the employee’s spouse, son, daughter or parent with a serious health condition.

Definition of "Serious Health Condition". A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves either (1) inpatient care, or (2) continuing treatment by a health care provider. "Inpatient care" means an overnight stay in a hospital, hospice, or residential medical care facility; any overnight stay in the hospital automatically qualifies as a serious health condition. If inpatient care is not involved, the person must be under "continuing treatment by a healthcare provider," which includes any one or more of the following:

1. Incapacity and Treatment. The person is incapacitated (unable to work, attend school, or perform other regular daily activities) for more than three consecutive full days, and either is treated in person two or more times by a health care provider within 30 days (absent extenuating circumstances), or is treated once in person by a health care provider with a regimen of continuing treatment under the supervision of the health care provider. The first treatment by the health care provider must be within seven days of the first day of incapacity. A regimen of continuing treatment includes, for example, a course of prescription medication or therapy requiring special equipment, such as oxygen. It does not generally include over-the-counter medications such as aspirin, antihistamines, or salves, or bed rest, drinking fluids, exercise, or other similar activities that can be initiated without visiting a health care provider. Unless complications arise, the common cold, flu, ear aches, upset stomach, minor ulcers, headaches (other than migraine), routine dental or orthodontia problems, periodontal disease, and the like do not meet the definition of a serious health condition.

2. Pregnancy or Prenatal Care. Any period of incapacity due to pregnancy, or for prenatal care. The person is not required to receive medical treatment during the absence, and the absence may be less than three days. For example, an employee may be unable to report to work due to severe morning sickness.

3. Chronic Conditions. Any period of incapacity due to a chronic serious health condition, and treatment for a chronic serious health condition. A chronic serious health condition is one that requires periodic visits (at least twice a year) to a health care provider or nurse, continues over an extended period of time, and may cause episodic rather than continuous incapacity. Examples of chronic conditions are asthma, epilepsy, and diabetes. The person is not required to receive medical treatment during the absence, and the absence may be less than three days. For example, an employee may not be able to report to work due to the onset of an asthma attack.

4. Permanent Long-term Conditions. These conditions result in a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. Examples are Alzheimer's, a severe stroke, or the terminal stages of a disease. The person need not be receiving active treatment, but must be under the continuing supervision of a healthcare provider.

5. Conditions Requiring Multiple Treatments. This category includes conditions that if left untreated would likely result in a period of incapacity of more than three days, such as cancer, severe arthritis, and kidney disease, which require treatments like chemotherapy, radiation, physical therapy and dialysis. It also includes restorative surgery after an accident or injury.
Leave for Treatment of Substance Abuse

Reference Number: CTAS-1020

Substance abuse can be considered a serious health condition if it falls within one of the categories defining a serious health condition, but FMLA leave can only be taken for treatment for substance abuse that is given by a health care provider or on referral by a health care provider. Absence for the employee’s use of the substance does not qualify for FMLA leave.\[1\]

\[1\] 29 C.F.R. §§ 825.113, 825.114, 825.115.

\[2\] 29 C.F.R. § 825.113.

\[3\] 29 C.F.R. § 825.114.

Military-related Leave

Reference Number: CTAS-1021

The 2008 amendments to the FMLA, and additional amendments made in 2009 in the National Defense Authorization Act for FY 2010 (NDAA 2010), added provisions for qualifying exigency leave when the employee's family member is serving on active duty or is called to active duty in a foreign country, and military caregiver leave to care for a family member who becomes seriously injured or ill in the line of duty while on active duty. These new provisions allow eligible employees to take up to 12 workweeks to attend to qualifying exigencies when the employee’s spouse, son, daughter or parent is on covered active duty or is called to covered active duty, and up to 26 workweeks in a single 12-month period to care for the employee’s spouse, son, daughter, parent, or next of kin with a serious injury or illness incurred in the line of duty on active duty.\[1\]

Protections afforded by Uniformed Services Employment and Reemployment Rights Act (USERRA) extend to all military members (active duty and reserve), and all periods of absence from work due to or necessitated by USERRA-covered service is counted in determining an employee's eligibility for FMLA leave. (29 CFR § 825.110).

\[1\] 29 C.F.R. §§ 825.119, 825.1126, 825.127.

Leave for Qualifying Exigency

Reference Number: CTAS-1022

An eligible employee is entitled to take FMLA leave for any "qualifying exigency" arising out of the fact that the employee's spouse, son, daughter, or parent is on, or has been notified of an impending call to, "covered active duty."\[1\] "Covered active duty" means (1) in the case of a member of the regular component of the Armed Forces, duty during deployment to a foreign country, and (2) in the case of a member of the reserve component of the Armed Forces, duty during deployment with the Armed Forces to a foreign country under a call to active duty.\[2\] "Qualifying exigency" includes the following: short-notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation and post-deployment activities. It also includes any additional activities that are agreed upon by the employee and employer.\[3\]

Eligible employees may take FMLA leave for the following "qualifying exigencies" that occur in connection with covered active duty or a call to covered active duty of the employee’s spouse, son, daughter or parent:

1. **Short notice deployment.** Leave may be taken to address any issues arising from the fact that a covered military member is notified of an impending call or order to active duty in support of a contingency operation seven calendar days or less prior to the date of
deployment. Leave for this purpose can be used for seven calendar days after the notice is received.

2. **Military events and related activities.** Leave may be taken to attend official ceremonies and events sponsored by the military related to the call to active duty, or to attend support or assistance programs or informational briefings.

3. **Childcare and school activities.** Leave may be taken to arrange for alternative childcare, to provide childcare on an urgent, immediate need basis, to enroll in or transfer to a new school or daycare facility, or to attend school meetings necessitated by the call to active duty.

4. **Financial and legal arrangements.** Leave may be taken to make legal and financial arrangements to address the military member’s absence while on active duty, or to act as the military member’s representative before a federal, state, or local agency regarding military service benefits.

5. **Counseling.** Leave may be taken to attend counseling provided by someone other than a health care provider.

6. **Rest and recuperation.** Up to fifteen days of leave may be taken to spend time with the military member on rest and recuperation leave during the period of deployment.

7. **Post-deployment activities.** Leave may be taken to attend arrival ceremonies, reintegration events, and other official ceremonies or programs sponsored by the military for 90 days after termination of active duty status, or to address issues arising from death of a military member while on active duty.

8. **Parental care.** Care for a military member’s parent who is incapable of self-care when the care is necessitated by the member’s covered active duty. Such care may include arranging for alternative care, providing care on an immediate need basis, admitting or transferring the parent to a care facility, or attending meetings with staff at a care facility. 29 C.F.R. § 825.126.

9. **Additional activities.** Leave may be taken for other events related to the military member’s active duty or call to active duty as long as the employee and the employer agree that the leave qualifies as an exigency and agree on the timing and duration of the leave.

Employees seeking qualifying exigency leave are required to give their employer reasonable notice if the exigency is foreseeable. The notice must advise the employer that a covered family member is on active duty or call-to-active-duty status, give a listed reason for the leave, and give the anticipated length of the absence. Covered active duty requires deployment to a foreign country. 29 CFR § 825.126.

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**Military Caregiver Leave**

Reference Number: CTAS-1023

An eligible employee who is the spouse, son, daughter, parent, or next of kin of a "covered servicemember" is entitled to take FMLA leave to care for the covered servicemember with a "serious injury or illness". [1]  

A "covered servicemember" is (1) a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or (2) a veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness and who was a member...
of the Armed Forces (including National Guard and Reserves) at any time during the period of five years preceding the date on which the veteran undergoes the treatment, recuperation, or therapy. The term “Next of kin” means the nearest blood relative of that individual. A “serious injury or illness” means in the case of a current member of the Armed Forces, including the National Guard or Reserves, an injury or illness incurred in the line of duty on active duty (or which existed prior to active duty but was aggravated by service in the line of duty on active duty) that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating. 29 CFR § 825.127.

A serious injury or illness for a covered veteran means an injury or illness that was incurred or aggravated by the member in the line of duty on active duty in the Armed Forces and manifested itself before or after the member became a veteran, and is-

1. A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember’s office, grade, rank or rating; or

2. A physical or mental condition for which the covered veteran has received a VA Service Related Disability Rating (VASRD) of 50 percent or greater and such VASRD rating is based, in whole or in part, on the condition precipitating the need for caregiver leave; or

3. A physical or mental condition that substantially impairs the veteran’s ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service or would do so absent treatment; or

4. An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. 29 C.F.R. § 825.127.

Leave under this category is calculated differently than other types of FMLA leave. Unlike the other types of leave under the FMLA, eligible employees are entitled to 26 workweeks in a single 12-month period to care for the covered servicemember with a serious injury or illness. The single 12-month period begins on the first day the employee takes leave to care for the servicemember and continues for 12 months thereafter, regardless of the method used to calculate other types of FMLA leave. If the employee does not take all of the 26-workweek entitlement during this single 12-month period, the remainder is forfeited. The leave entitlement applies on a per-covered-servicemember, per-injury basis, so an eligible employee could be entitled to more than one 26-week period of leave if more than one family member is involved or subsequent illness or injury occurs, but no more than 26 workweeks can be taken within any single 12-month period.

An employee is limited to a combined total of no more than 26 workweeks of leave for any FMLA-qualifying reason during the single 12-month period, and is limited to a total of 12 workweeks for all other FMLA leave (birth or placement of a child, serious health condition of employee or immediate family or qualifying exigency).


Amount and Timing of Leave under the FMLA

Reference Number: CTAS-1024

For most categories of leave, eligible employees may take up to 12 workweeks of FMLA leave during each employer-specified 12-month period. Employers are given four options for their 12-month period. The rules are slightly different for military caregiver leave, where the leave entitlement begins when the reason for the leave arises regardless of which 12-month period the employer uses for other types of FMLA leave, and employees may take up to 26 workweeks of leave per occurrence beginning on the first day leave is taken and continuing for 12 months thereafter. Leave under the FMLA may be taken all at once, in blocks of time, intermittently, or on
a reduced work schedule.

**The 12-Month Period.**[1] Employers must choose one of the following four options as their 12-month period for FMLA leave purposes:

1. the calendar year;
2. any fixed 12-month leave year, such as the fiscal year or a year starting on the employee’s anniversary date;
3. the 12-month period measured forward from the date the employee first takes FMLA leave; or
4. a rolling 12-month period measured backward from the date the employee uses any FMLA leave.

The method chosen should be set out in the employer’s FMLA policy. The employer must apply the chosen method consistently and uniformly to all employees. Once established, the employer may change the 12-month period only by giving 60 days advance notice to employees and implementing the change so that employees do not lose any leave benefits during the transition. If an employer fails to designate one of these four options, the option that provides the most benefit to the employee will be used to calculate an employee’s leave entitlement, so it is important that the employer designate the 12-month period.

**The 12-Workweek Entitlement.**[2] Eligible employees are entitled to a total of 12 workweeks of leave during each 12-month period for all categories of FMLA, with the exception of military caregiver leave. The 12-workweek entitlement applies to leave taken for one or more of the following reasons: for the birth or placement of a child; to care for the employee’s parent, son, daughter or spouse with a serious health condition; for the employee’s own serious health condition; and for a qualifying exigency.

**The 26-Workweek Entitlement.**[3] Eligible employees are entitled to a total of 26 workweeks of military caregiver leave to care for a family member who becomes seriously injured or ill while on active duty in the line of duty. This is a one-time entitlement per covered servicemember, per injury or illness, and it begins on the first day the employee takes leave for this purpose. During the single 12-month period of military caregiver leave, the employee’s leave entitlement is limited to a combined total of 26 workweeks for all FMLA purposes, and to a total of 12 workweeks for those purposes set out above to which the 12-workweek entitlement applies.

**Spouses Working for the Same Employer.**[4] If both husband and wife work for the same employer (i.e., the county), they are limited to a combined total of 12 workweeks of leave in any one 12-month period for (1) birth or placement of a child and routine care afterward, or (2) caring for a parent with a serious health condition. If the husband and wife both use a portion of the 12 workweeks for those purposes, each is entitled to use their remaining entitlement (the difference between the amount he or she has taken individually and 12 workweeks) for other qualifying purposes. Note that this limitation does not apply to leave to care for a child with a serious health condition; for example, if a newborn child has a serious health condition the mother and father each may take up to 12 workweeks of leave if needed to care for the child, even if they work for the same employer. When military caregiver leave is involved, spouses working for the same employer may be limited to a combined total of 26 workweeks of leave during the single 12-month period.


**Intermittent Leave and Reduced Leave Schedules**

Reference Number: CTAS-1025
Intermittent leave is FMLA leave taken in separate blocks of time for a single qualifying reason. A reduced leave schedule is a reduction in an employee’s usual working hours. A reduced leave schedule is a change in the employee’s work schedule for a period of time, usually from full time to part time.[1]

Medical Necessity. For intermittent leave or a reduced leave schedule for the employee’s own serious health condition, or to care for a covered family member with a serious health condition, or for military caregiver leave, there must be a medical need for the leave to be taken in this manner. The medical necessity can be addressed in the medical certification, if the employer requires one. When leave is taken after the birth or placement of a healthy child, the employee is not entitled to take intermittent leave or a reduced leave schedule unless the employer agrees. Leave for a qualifying exigency may be taken on an intermittent or reduced leave schedule without medical necessity.

Scheduling.[2] Scheduling when there is medical necessity will usually be dependent on the medical necessity, but when an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, the employee must make a reasonable effort to schedule the treatment so as not to disrupt the employer’s operations unduly. Intermittent or reduced leave may be taken whenever there is a qualifying exigency.

Transfer or Reassignment.[3] When an employee is taking intermittent or reduced leave that is foreseeable based on planned medical treatment, or if the employer agrees to permit it for the birth or placement of a healthy child, the employer may transfer the employee to an available alternative position for which the employee is qualified and which better accommodates the recurring periods of leave. The position need not have equivalent duties, but the pay and benefits must be equivalent. The employer may proportionally reduce benefits such as vacation leave where the normal practice is to base the benefit on the number of hours worked. The employee cannot be required to take more leave than is medically necessary, and the employer cannot use the transfer to discourage the employee from taking leave or to otherwise work a hardship on the employee. When the employee is able to return to full-time work, the employee must be placed in the same or an equivalent job as the job he or she left when the intermittent or reduced leave commenced.


Calculating FMLA Leave

Reference Number: CTAS-1026

The employee’s actual workweek is the basis of the FMLA leave entitlement. Accordingly, if an employee who regularly works 40 hours in a workweek uses eight hours of leave, that employee has taken 1/5 of a workweek. Similarly, if an employee who regularly works eight-hour days works four-hour days under a reduced leave schedule, that employee uses ½ workweek of FMLA leave for each week of the reduced leave schedule. A part-time employee who normally works 30 hours each week but works only 20 hours under a reduced leave schedule is taking 1/3 of a workweek of FMLA leave each week. The employer may convert these fractions to the hourly equivalent as long as the conversion equitably reflects the employee’s total normally-scheduled hours.

The employer must account for FMLA leave using the smallest increment the employer uses to account for other forms of leave, but it cannot be more than one hour. For example, if the employer accounts for other leave in ½ day increments, the employer must use one-hour increments for FMLA leave. If the employer accounts for other leave in 15-minute increments, FMLA leave must be accounted for in 15-minute increments. The employee’s FMLA entitlement cannot be reduced by more than the amount of leave actually taken.

Employers may not require the employee to take more leave than necessary to address the
circumstances that precipitated the need for leave. Employees may not be charged FMLA leave for periods during which they are working. 29 C.F.R. § 825.205.

When it is physically impossible for an employee to start or end work mid-way through a shift, the entire period the employee is forced to be absent is counted against the employee’s FMLA leave entitlement. The physical impossibility provision is to be applied in only the most limited circumstances, and the employer bears the responsibility to restore the employee to the same or equivalent position as soon as possible. 29 C.F.R. § 825.205.

Overtime. If an employee normally would be required to work overtime but cannot due to an FMLA-qualifying reason, the hours the employee normally would have been required to work may be counted against the employee’s FMLA entitlement. For example, if an employee normally would be required to work 48 hours in a workweek but because of a serious health condition can work only 40 hours, that employee is on a reduced leave schedule and would be using eight hours out of each 48-hour workweek, or 1/6 of a workweek. Voluntary overtime hours that the employee does not work may not be counted against the employee’s FMLA leave entitlement.

Holidays. If a holiday occurs during a full week of FMLA leave, the holiday has no effect and the week is counted as a week of FMLA leave. However, if the employee is using leave in increments of less than one week, the holiday does not count against the employee’s FMLA leave entitlement unless the employee was scheduled and expected to work on the holiday.[1]


Required Notices and Designation of Leave

Reference Number: CTAS-1027

Employers are required to notify employees of their rights and obligations under the FMLA as well as providing notice of their eligibility for leave, the terms and conditions of the leave, and the consequences of not meeting these terms and conditions.

Employer Notice Requirements

Reference Number: CTAS-1028

Employers are required to provide four types of notice: (1) general notice, (2) eligibility notice, (3) rights and responsibilities notice, and (4) designation notice. If an employer fails to provide the required notices, the employer can be held liable for any damages the employee incurs as a result of the lack of notice. The DOL has developed three forms the employer may use for these purposes (the eligibility notice and the rights and responsibilities notice have been combined into one notice). Employers are not required to use these forms, but it is highly recommended in order to avoid mistakes in giving the required notices.[1]

Fact Sheet #28D: Employer Notification Requirements under the Family and Medical Leave Act

General Notice

Reference Number: CTAS-1029

All employers who are covered by the FMLA are required to post a notice in a conspicuous place explaining the FMLA’s provisions and explaining how employees may file complaints with the DOL’s Wage and Hour Division. The notice must be posted where it can be seen by employees and applicants for employment. This notice may be given electronically as long as it meets the other requirements. An employer who willfully fails to post this notice may be assessed a civil money penalty of $169 for each offense under 29 C.F.R. 825.300(a)(1).

The employer also is required to provide the general notice to employees by including it in the employee handbook or other written materials concerning employee benefits or leave rights, if the employer has any of these, or by distributing the general notice to each new employee upon
hiring. This also may be accomplished electronically.

This notice can easily be given using the DOL’s prototype notice, commonly known as the “FMLA poster” (WHD publication 1420). If the prototype is not used, the notice given must contain all information that is in the prototype notice.

Eligibility Notice

Reference Number: CTAS-1030
When an employee requests FMLA leave, or when the employer learns that an employee’s leave may be for an FMLA-qualifying reason, the employer is required to notify the employee of the employee’s eligibility to take FMLA leave within five business days, absent extenuating circumstances. The eligibility notice must state whether the employee is eligible to take leave under the FMLA, and if not, at least one reason why not. This notice may be oral or in writing. Employers may use the DOL’s combined prototype Notice of Eligibility and Rights and Responsibilities (Form WH-381) for this purpose.

If an employee provides notice of a subsequent need for FMLA leave during the same 12-month period and the employee’s status has not changed, no further eligibility notice is required. If the employee’s status has changed, the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.

Rights and Responsibilities Notice

Reference Number: CTAS-1031
The employer must give the employee written notice detailing the specific expectations and obligations of the employee during leave, and the consequences of failure to meet those obligations. This notice must be provided each time a Notice of Eligibility is provided. If the leave already has begun, the notice must be mailed to the employee’s address of record. This notice must include the following information:

1. That the leave may be designated and counted against the employee’s annual FMLA leave entitlement and the applicable 12-month period;
2. Any certifications the employer requires, such as certification of a serious health condition, serious injury or illness, or qualifying exigency, and the consequences of failure to provide these;
3. The employee’s right to substitute paid leave, whether the employer will require the employee to take paid leave, the conditions related to any substitution of paid leave, and the employee’s entitlement to take unpaid leave if the employee does not meet the requirements for paid leave under the employer’s paid leave policies;
4. Any requirements for the employee to make any insurance premium payments and the consequences of failure to make these payments timely;
5. Whether the employee is a “key employee” and explaining the potential consequence that restoration may be denied;
6. The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave; and
7. The employee's potential liability for payment of any health insurance premiums paid by the employer if the employee fails to return to work after the leave.

29 C.F.R. § 825.300.

The Notice of Rights and Responsibilities may, but is not required to, contain other information, such as whether the employer requires periodic reports of the employee’s status and intent to return to work. This Notice should be accompanied by any certification forms that are required.

Employers may use the DOL’s combined prototype Notice of Eligibility and Rights and Responsibilities (Form WH-381) for this purpose. While use of this prototype is not required, it is strongly recommended that employers use it to ensure that all required information is provided. This notice also may be distributed electronically.

Designation Notice
The employer is responsible for designating leave as FMLA leave and for giving the employee notice of the designation. The notice is to be given within five business days after employer has enough information to determine whether the leave is for a FMLA-qualifying reason (e.g., after medical certification has been received), absent extenuating circumstances. Only one designation notice is required for each qualifying FMLA reason in a 12-month period. If the employer determines that the leave does not qualify, the employer must notify the employee of that determination.

If the employer will require a fitness for duty certification before the employee returns to work, this requirement should be included in the designation notice. If this requirement is clearly set out in the employee handbook or other written documents describing the employer’s leave policies, written notice is not required with the designation notice but oral notice must be given.

The designation notice must be in writing. The DOL has a prototype Designation Notice to Employee of FMLA Leave (Form WH-382) that can be used for this purpose. The employer is not required to use the DOL form, but it is strongly recommended.

Designating Leave as FMLA Leave. An employee does not need to state rights expressly under the FMLA or even mention the FMLA giving notice of the need for leave, but the employee does need to state a qualifying reason for the leave. It is the employer’s responsibility to designate the leave as FMLA leave. The employer’s decision to designate leave as FMLA leave must be based solely on information received from the employee, or the employee’s spokesperson if the employee is incapacitated, and if additional information is needed the employer should inquire further of the employee or spokesperson (including making a request for any appropriate certifications). When the employer has sufficient knowledge that the leave is being taken for a FMLA-qualifying reason, the employer must designate the leave and the designation notice must be given within five business days, absent extenuating circumstances.

Retroactive Designation. An employer may retroactively designate leave as FMLA leave with appropriate notice to the employee, but only if the employer’s failure to designate the leave in a timely manner does not cause harm or injury to the employee. Failure to timely designate leave resulting in harm to the employee can be considered interference with, a restraint of, or denial of an employee’s FMLA rights. If it causes harm, the employer could be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result, and for appropriate equitable or other relief such as employment, reinstatement, promotion, or other relief tailored to the harm suffered. For example, if an employee took leave to provide care for a parent with a serious health condition believing it would not count against his or her FMLA leave entitlement, and planned to use that FMLA leave later to provide care for a spouse recovering from surgery planned for a later date, the employee may be able to show harm as a result of the employer’s failure to designate the leave timely. The employee could establish this by showing that he or she would have arranged alternative caregivers for the parent if the employer had designated the leave timely.

29 C.F.R. §§ 825.300 and 825.301.

Employee Notice Requirements

The FMLA rules for employee notices are not as stringent as those for the employer, but employees are required to give their employers reasonable notices related to their leave. When substituting paid leave, employees may be required to follow the employer’s usual and customary notice and procedural policies for that type of paid leave.

When the need for leave is foreseeable, the employee must provide at least 30 days advance notice before the FMLA leave is to begin. If 30 days notice is not practicable, notice must be given as soon as practicable (meaning both possible and practical based on the individual circumstances). If the employee fails to give the required 30 day notice, upon request by the employer the employee must explain why giving this notice was not practicable.

The notice may be verbal. It must be sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave.
The first time an employee requests leave for an FMLA-qualifying reason, the employee need not assert rights under the FMLA or even mention the FMLA. Subsequent requests for leave for the same reason must specifically reference the qualifying reason or the need for FMLA leave.

If the employee fails to give notice as required by the FMLA without reasonable excuse, the employee's leave may be delayed, but only if it is clear that the employee had actual notice of the FMLA notice requirements. This condition may be satisfied by proper posting of the general notice and distribution of the general notice either in an employee handbook or other written distribution.\[2\]

Certifications and Reports
Reference Number: CTAS-1034

General Rules\[1\] Employers may require certification of the need for leave related to a serious health condition of the employee or a family member, and leave for qualifying exigencies and military caregiver leave. In most cases, this certification should be requested at the time the employee gives notice of the need for leave or within five business days thereafter (this is included in the prototype Notice of Eligibility and Rights and Responsibilities, Form WH-381), but the employer may request certification at a later date if the employer later has reason to question the appropriateness of the leave or its duration. The employee must provide the requested certification within 15 calendar days after the employer’s request, unless it is not practicable despite the employee’s diligent, good faith efforts.

The employee must provide a complete and sufficient certification. The certification is incomplete if one or more of the applicable entries have not been completed. It is insufficient if the information provided is vague, ambiguous or non-responsive. If the certification is incomplete or insufficient, the employer must advise the employee in writing of the information necessary to make it complete or sufficient and give the employee seven calendar days (unless impracticable) to cure the deficiency.

At the time the certification is requested the employer must advise the employee of the consequences of failure to return the certification. If an employee fails to provide complete and sufficient certification despite an opportunity to cure, or fails to provide any certification, the employer may deny FMLA coverage until the required certification is provided. If the employee never provides the certification, the leave is not protected under the FMLA.


Medical Certifications
Reference Number: CTAS-1035

When leave is taken for the employee’s own serious health condition or that of a family member, the employer may require that the employee provide certification from a health care provider containing the following information:\[1\]:

1. Name, address, telephone and fax number of the health care provider and type of medical practice or specialty;
2. Approximate date of onset of the serious health condition and its probable duration;
3. Statement of medical facts to support the need for leave (may include information such as symptoms, diagnosis, hospitalization, prescribed medication, referrals for evaluation or treatment, or other regimen of treatment);
4. If the employee is the patient, information sufficient to establish that the employee

cannot perform the essential functions of the employee’s job, as well as the nature of any work restrictions, and the likely duration of the incapacity;

5. If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care and an estimate of the frequency and duration of the leave required to provide the care;

6. If intermittent or reduced leave is requested for planned medical treatment, information sufficient to establish the medical necessity for the intermittent or reduced leave and an estimate of the dates and duration of treatment and any period of recovery;

7. If intermittent or reduced leave is requested for the employee’s serious health condition that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for the intermittent or reduced leave and an estimate of the frequency and duration of the episodes of incapacity; and

8. If intermittent or reduced leave is requested for a covered family member with a serious health condition, a statement that the leave is medically necessary to care for the family member and an estimate of the frequency and duration of the required leave.

“Health care provider” includes any of the following: doctors of medicine or osteopathy authorized to practice medicine or surgery in the state; podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers and physician assistants properly authorized to practice and perform within the scope of their practice; Christian Science Practitioners listed with the First Church of Christ, Scientist, in Boston (in such case a second or third opinion may be obtained from someone other than a Christian Science Practitioner); any health care provider from whom the employer’s group health plan’s benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and a health care provider practicing in a foreign country in accordance with the laws of that country and within the scope of that practice as defined by that country’s law.

The DOL has developed two forms for this purpose: Form WH-380E is for the employee’s own serious health condition, and Form WH-380F is for leave to care for a covered family member with a serious health condition. The use of these forms is optional, but highly recommended.


Authentication and Clarification

Reference Number: CTAS-1036

If the employee submits a complete and sufficient certification, the employer may not request additional information from the health care provider. The employer may, however, contact the health care provider for authentication and clarification of the certification after the employer has given the employee an opportunity to cure any deficiencies in the certification. To make this contact, the employer must use a health care provider, human resources professional, leave administrator, or management official. Under no circumstances may the employee’s direct supervisor contact the employee’s health care provider.

Authentication means verification that the certification form was completed or authorized by the health care provider. Clarification means contacting the health care provider to understand the handwriting or the meaning of a response. Employers may not ask health care providers for more information that is contained on the form. [1]


Second and Third Opinions

Reference Number: CTAS-1037
If the employer has reason to doubt the validity of a medical certification, the employer may require the employee to obtain a second opinion, at the employer’s expense, from a health care provider designated by the employer, as long as the health care provider is not employed on a regular basis by the employer and does not regularly contract with the employer. If the first and second opinions differ, the employer may require the employee to obtain a third certification, again at the employer’s expense, from a health care provider chosen or approved by the employer and the employee. The third opinion will be binding. The employer is required to provide the employee with copies of the second and third opinions upon request, within five business days after the request is made.\[1\]

Recertification

Reference Number: CTAS-1038

The general rule is that an employer may ask for recertification no more often than every 30 days while the employee is on leave. If the medical certification indicates that the duration is expected to be more than 30 days, recertification cannot be requested until expiration of that duration or six months, whichever is sooner. An employer may request recertification in less than 30 days if the employee requests an extension of leave, if circumstances change significantly from the prior medical certification, or if the employer receives information that casts doubt on the employee’s stated reason for leave or the continuing validity of the certification. The employer may ask for the same information on recertification as permitted for the original certification. The employer must allow the employee at least 15 calendar days to provide the recertification. Recertifications are at the employee’s expense.\[1\]

Annual Medical Certification

Reference Number: CTAS-1039

When an employee’s leave for a serious health condition extends beyond a single leave year, the employer may require a new medical certification in each subsequent leave year, subject to the same provisions for authentication, clarification, and second and third opinions as the original certification.\[1\]

Military-related Certifications

Reference Number: CTAS-1040

Employers are entitled to obtain certification of the need for leave for qualifying exigencies and for military caregiver leave. The DOL has developed forms for these purposes: Form WH-384 for qualifying exigency, and Form WH-385 for military caregiver leave. These forms are optional, but highly recommended.

Certification of Leave for Qualifying Exigency.\[1\] The first time an employee requests leave for a qualifying exigency arising out of the active duty or call to active duty of a covered military member, the employer may require a copy of the military member’s active duty orders or other military documentation showing the call to active duty or active duty status, and the dates of the active service. This need only be provided once.

When the employee asks for leave for a qualifying exigency, the employer may require a certification signed by the employee containing the information contained in DOL’s Form WH-384.
The use of this form is not required, but it is highly recommended. No information other than that set out in the DOL’s form may be requested from the employee.

The employer may contact the appropriate unit of the Department of Defense to verify that a covered military member is on covered active duty or call to active duty status, but no further information may be requested. If the qualifying exigency involves meeting with a third party, the employer may contact the individual or entity to verify the meeting schedule and the nature of the meeting. The employee’s permission is not necessary to make either of these contacts.

Certification for Military Caregiver Leave. When leave is taken to care for a covered servicemember with a serious injury or illness, the employer may require the employee to provide certification by an authorized health care provider of the covered servicemember, which includes any of the following:

1. A U.S. Department of Defense ("DOD") health care provider,
2. A U.S. Department of Veterans Affairs ("VA") health care provider,
3. A DOD TRICARE network authorized private health care provider, or

The employer may request certification from the health care provider, and from the employee or covered servicemember, relative to the injury or illness and the need for leave. The information the employer is authorized to request is contained on the optional DOL Form WH-385. It is highly recommended that the employer use the DOL form in order to ensure that the appropriate information is obtained and no unauthorized information is requested. In lieu of this form, however, employers are required to accept “invitational travel orders” (ITOs) or “invitational travel authorizations” (ITAs) issued to any family member to join an injured or ill servicemember at his or her bedside. An ITO or ITA is sufficient certification for the duration of time specified in the ITO or ITA, and authorizes leave either in a single block of time or on an intermittent basis; no further certification is necessary.


Reports of Status and Intent to Return to Work

Reference Number: CTAS-1041

An employer may require an employee who is on FMLA leave to report periodically on the employee’s status and intent to return to work. If an employee gives unequivocal notice that he or she does not intend to return to work, the employer’s obligations to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. The intention must be expressed unequivocally; if the employee states that he or she may not be able to return to work but expresses a desire to do so, the employer’s obligations continue.

If the employee’s status changes during leave (i.e., the employee needs more or less leave than originally anticipated), the employer may require reasonable notice of the changed circumstances where foreseeable. Two business days is considered reasonable for this purpose. The employer may receive this information through the requested periodic status reports.

Fitness for Duty Certification. As a condition to being restored to employment, an employer may require an employee who has been on FMLA leave for the employee’s own serious health condition to provide a fitness for duty certification from a health care provider stating that the employee is able to resume work. The employer’s policy must be applied uniformly and require all similarly-situated employees to present the certification. The certification only applies to the condition for which leave was taken. The employer may require that the certificate specifically address the employee’s ability to resume the essential functions of the employee’s job. The employee must be advised in the Designation Notice whether the employer requires a fitness for duty certification and whether it must address the essential functions of the employee’s position. The employer may delay restoration to employment until the employee submits the required
fitness for duty certification. No second or third opinions on a fitness-for-duty certification may be required.

Sample Fitness for Duty Certification


Employee Rights During and After Leave

Reference Number: CTAS-1042

Substitution of Paid Leave. Generally, FMLA leave is unpaid leave. However, if an employee has accrued paid leave under the employer’s established paid leave policies and the employee complies with the employer’s policies for taking that leave, the employee may choose to substitute the accrued paid leave for all or part of the FMLA leave entitlement. Even if the employee does not choose to substitute paid leave, the employer may require the employee to substitute the employee’s accrued paid leave. This substitution means that the FMLA leave and the accrued paid leave will run concurrently and the employee receives pay during the period of otherwise unpaid FMLA leave. If neither the employee nor the employer elects to substitute paid leave, the employee will remain entitled to all paid leave earned or accrued under the employer’s leave plan.

Maintenance of Benefits. Generally, the employer is required to treat employees on FMLA leave the same as employees who are on non-FMLA leave (paid or unpaid) for benefits purposes. Employers are not required to maintain most benefits unless the employer does so for employees who are on other similar types of leave.

Group Health Coverage. Regardless of how other benefits are handled, employers are required to maintain group health plans for employees on FMLA leave on the same terms and conditions as if the employee were continuously at work during the entire leave period. “Group health plan” is defined as any plan provided by or contributed to by the employer to provide health care to employees, former employees or the families of these employees. If the employer provides a new health plan or benefits or changes benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan or benefits to the same extent as if the employee were not on leave. Any other plan changes, such as changes in coverage, premiums, or deductibles, apply to the employee as well. The employee on FMLA leave must be notified of these changes like other employees.

If employees are required to pay a share or all of their group health coverage premiums, the employee must continue to pay these premiums while the employee is on FMLA leave. If premiums are raised or lowered during the leave, the employee is subject to the new rates. If the FMLA leave is paid leave, the employee’s share of the premiums must be paid by the method used during any paid leave (usually payroll deduction). If it is unpaid, the employee must make payments during leave. The employer may require the employee to pay either the employer or the employer’s insurance company, in any of the following ways:

1. payment due at the same time as if done by payroll deduction;
2. payments due on the same schedule as under COBRA;
3. payments pre-paid pursuant to a cafeteria plan at the employee’s option;
4. using the employer’s existing rules for payment of premiums on leave without pay as long as they do not require pre-payment of all premiums before the leave begins; or
5. using another system voluntarily agreed to by the employer and employee, which may include pre-payment.

The employer must provide the employee advance notice of the terms and conditions under which these payments must be made. This is done in the Notice of Eligibility and Rights & Responsibilities (DOL Form WH-381).

Failure to Pay Premiums. If an employee’s payments are more than 30 days late (or longer if the employer has an established grace period that is longer), the employer’s obligation to maintain
health insurance coverage ceases. The employer must provide written notice to the employee that the coverage will be dropped on a specified date at least 15 days after the date of the letter unless payment is received prior to that date, and the letter must be mailed to the employee at least 15 days before coverage is to cease.

If coverage lapses for non-payment, the employer is still required to reinstate the employee’s coverage when the employee returns to work, and the coverage must be reinstated to the same level the employee would have had if leave had not been taken, including any family or dependent coverage. The employee may not be required to meet any qualification requirements imposed by the plan, including any pre-existing condition waiting period, or to pass a medical examination to obtain reinstatement of coverage.

If the employee fails to return to work after FMLA leave has been exhausted or expires, the employer may recover its share of health plan premiums paid during unpaid FMLA leave, unless the reason the employee does not return to work is either the continuance, recurrence, or onset of another serious health condition, or other circumstances beyond the employee’s control. The employer may require certification of the serious health condition. An employee is deemed to have returned to work if the employee works for at least 30 calendar days. Also, an employee who transfers directly, or within 30 days after FMLA leave, to retirement is deemed to have returned to work. An employer may not recover its share of premiums paid during any kind of paid leave.

If the employer elects to pay the employee’s share of health or non-health premiums in order to maintain the coverage during leave (e.g., to enable the employer to reinstate the employee with the same benefits upon return to work), the employer may recover these payments (but only the employee’s share) regardless of whether the employee returns to work. If the employee fails to return to work, the amount may be deducted from any amounts owed to the employee, such as unpaid wages, vacation pay, and the like, subject to applicable state and federal laws. Alternatively, the employer may initiate legal action against the employee to recover these costs.


Protections for Employees Who Assert FMLA Rights

Reference Number: CTAS-1043

The FMLA contains the following protections for employees who assert rights under the FMLA[1]:

1. An employer is prohibited from interfering with or denying the exercise of any rights under the FMLA.
2. An employer is prohibited from discharging or discriminating against any person for opposing or complaining about any unlawful practice under the FMLA.
3. All persons are prohibited from discharging or in any way discriminating against any person who has filed a charge or instituted a proceeding related to the FMLA, given information or testified in connection with an inquiry or proceeding related to rights under the FMLA.

The prohibition on interference means that employers may not discriminate or retaliate against an employee or prospective employee for having exercised or attempting to exercise FMLA rights. Employers cannot use the taking of FMLA leave as a negative factor in employment decisions.

Employers who violate the act by interfering with or denying rights under the FMLA may be liable for compensation and benefits lost by the employee and other actual monetary losses sustained as a direct result of the violation. Individuals may obtain appropriate equitable relief, including employment, reinstatement, promotion, or other relief tailored to the harm suffered.
Right to Reinstatement.[2] The general rule is that upon return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave began, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. This requirement does not extend to de minimis, intangible or unmeasurable aspects of the job.

Equivalent Position.[3] An equivalent position is one that is virtually identical in terms of pay, benefits, and working conditions, including privileges, perquisites and status. It must have the same or substantially similar duties and responsibilities and entail equivalent skill, effort, responsibility and authority. The employee is normally entitled to return to the same shift or the same or an equivalent work schedule, but if the employee requests a different shift, schedule, or position that better accommodates the employee’s needs on return from leave, the employer may agree to the changes. However, the employee cannot be induced into a different position against the employee’s wishes.

Equivalent Pay.[4] The employee is entitled to any unconditional pay increases and bonuses that occurred during the employee’s leave period, such as cost of living increases. Pay increases and bonuses based on seniority, length of service, or work performed must be granted in the same way the employer does for employees on an equivalent leave status that does not qualify for FMLA leave. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked or perfect attendance, and the employee does not meet the requirements due to FMLA leave, the payment may be denied unless the employer pays it to employees on equivalent non-FMLA leave. The employee also is entitled to a position with equivalent pay premiums (such as a position that usually has overtime work with overtime pay).

Equivalent Benefits.[5] Benefits includes all benefits provided or made available to employees, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits and pensions. When the employee is reinstated, the benefits must be resumed in the same manner and at the same levels as provided when the leave began, with any changes applicable to the entire workforce. An employee cannot be required to re-qualify for any benefits the employee had prior to the leave’s commencement. Employers should make sure they are able to meet this requirement, even if it means paying the employee’s share of the costs to maintain the benefits (subject to recovery from the employee upon return from leave – see Failure to Pay Premiums).

For purposes of pension and other retirement benefits, a period of unpaid FMLA leave is not treated as a break in service for vesting or eligibility to participate, but periods of unpaid FMLA leave need not be treated as credited service.

Accrual of Additional Benefits.[6] The employee is not entitled to accrue any additional benefits (such as sick leave or annual leave) or seniority during unpaid FMLA leave unless the employer allows it. Benefits accrued at the time leave began, however, must be made available to the employee upon return from leave.

Limitations on the Right to Reinstatement.[7] The employee on FMLA leave has no greater right to reinstatement than if he or she had been continuously working during the leave period. Other factors also can affect an employee’s right to reinstatement after FMLA leave.

Job Elimination or Changes. To deny reinstatement due to elimination of the employee’s position, the employer must be able to show that the employee would not otherwise have been employed at the time reinstatement is requested. For example, if the employee is laid off and employment is terminated during FMLA leave, the employer’s responsibilities under the FMLA cease as long as the employer can prove that the employee would have been laid off regardless of the FMLA leave. Similarly, if a shift has been eliminated or overtime has been decreased, the employee would not be entitled to return to work that shift or the original overtime hours upon restoration. If the employee was hired for a specific term or project and that term expires or project ends during the FMLA leave period and the employer would not otherwise have continued to employ the person, the employer has no obligation to reinstate the employee.

Fraud or Failure to Comply with Requirements. An employee who fraudulently obtains FMLA leave is not entitled to job restoration or maintenance of health benefits. Restoration may be delayed or denied if an employee fails to provide a required fitness for duty certification.

Supplemental Employment while on FMLA Leave. If the employer has a uniformly-applied policy
governing outside or supplemental employment, the policy may continue to apply to an employee on FMLA leave. An employer who does not have such a policy may not deny benefits on this basis unless the FMLA leave was fraudulently obtained.

**Inability to Perform Essential Functions of Position.** If at the end of FMLA leave the employee is unable to perform the essential functions of the position due to a mental or physical condition, including the continuation of a serious health condition or an injury or illness that is covered by worker’s compensation, the employee has no right to restoration to another position under the FMLA. However, the employer’s obligations may be governed by the Americans with Disabilities Act, worker’s compensation or other laws.

**Key Employees.** Under a very limited exception, employers may deny restoration to key employees when necessary to prevent substantial and grievous economic injury to the operations of the employer. A “key employee” is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all employees employed by the employer within 75 miles of the work site. The test for substantial and grievous economic injury is a stringent one that requires a threat to the economic viability of the employer or substantial long-term economic injury, and would not include minor inconveniences or costs that the employer would experience in the normal course of doing business.


**Special Rules for Schools**

Reference Number: CTAS-1044  
Special rules apply to instructional employees of local educational agencies (including county school boards) that affect the taking of intermittent leave, leave on a reduced schedule or leave near the end of an academic term. The term “instructional employees” includes teachers, athletic coaches, driving instructors, and special education assistants, but it does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, bus drivers or maintenance workers. Special rules also apply to restoration to an equivalent position, and these apply to all school employees. [1]

The period during summer vacation when the employee would not have been required to work is not counted against the employee’s FMLA leave entitlement. Leave that ends with the school year and begins the next semester is considered leave taken consecutively rather than intermittently.

**Limitations on Intermittent and Reduced Leave.** If an eligible instructional employee needs intermittent leave or leave on a reduced schedule that is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employer may require the employee to choose either to take leave in a block or blocks of time not greater than the duration of the planned treatment, or transfer temporarily to an available alternative position for which the employee is qualified, with equivalent pay and benefits, and which better accommodates recurring periods of leave. The block or blocks of time begin no sooner than the first day leave is needed and end no later than the last day on which leave is needed; it may be one uninterrupted block of time. If an instructional employee fails to give the required notice of foreseeable FMLA leave to be taken intermittently or on a reduced schedule, the employer may require the employee to take
leave of a particular duration or transfer temporarily to an alternative position, or delay the leave until the notice requirement is met.

Limitations on Leave Near End of Term. Instructional employees who take leave near the end of the term are subject to the following rules:

1. If the leave begins more than five weeks before the end of a term, the employer may require the employee to continue taking leave until the end of the term if the leave will last more than three weeks and the employee would return to work during the three-week period before the end of the term.

2. If the leave begins during the five-week period before the end of the term because of the birth or placement of a child, to care for a family member with a serious health condition, or to care for a covered servicemember, the employer may require the employee to continue taking leave until the end of the term if the leave will last more than two weeks and the employee would return to work during the two-week period before the end of the term.

3. If the employee begins leave during the three-week period before the end of the term for the birth or placement of a child, to care for a family member with a serious health condition, or to care for a covered servicemember, the employer may require the employee to continue taking leave until the end of the term if the leave will last more than five working days.

If the employee is required to take leave until the end of the term under these rules, only the leave taken until the employee is ready and able to return to work is charged against the employee’s FMLA leave entitlement. The additional leave required by the employer is not counted as FMLA leave, but the employer is required to maintain group health insurance and restore the employee to the same or a similar position upon conclusion of the leave.

Special Rules on Restoration to Equivalent Position. The determination of how all school employees are to be restored to an equivalent position is to be made on the basis of established written school board policies and collective bargaining agreements. The policy or collective bargaining agreement must provide for restoration to a position with equivalent benefits, pay, and other terms and conditions of employment.

[1] 29 C.F.R. § 825.600 et seq.

Recordkeeping

Reference Number: CTAS-1045

Covered employers are required to keep records in accordance with the recordkeeping requirements of the federal Fair Labor Standards Act (FLSA)[1]. No particular form of records is required, but employers having eligible employees are required to keep records containing the following information for at least three years:

1. Basic payroll and identifying employee data, including name, address and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period, additions to or deductions from pay; and total compensation paid.

2. Dates FMLA leave is taken by eligible employees; leave must be designated as FMLA leave in records and such leave may not include leave required under state law or an employer plan that is not also covered by FMLA.

3. If FMLA leave is taken in increments of less than one full day, the hours of the leave.

4. Copies of employee notices of leave furnished to the employer under FMLA if in writing, and copies of all written notices given to employees as required by the FMLA; copies may be maintained in employee files.

5. Any documents (including written and electronic records) describing employee benefits or employer policies regarding taking paid and unpaid leave.
6. Premium payments for employee benefits.
7. Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

If an employee is not subject to the FLSA’s recordkeeping requirements for minimum wage and overtime purposes (i.e., “exempt” employees), the employer need not keep a record of actual hours worked by the employee as long as eligibility for leave is presumed if the employee has been employed for at least 12 months, and with regard to employees who take leave intermittently or on a reduced leave schedule, as long as the employer and the employee maintain a written record of their agreement on the employee’s normal schedule or average hours worked each week.

Records and documents related to certifications, re-certifications, or medical histories must be maintained as confidential medical records in separate files from the usual personnel files. If the Americans with Disabilities Act (ADA) applies, these records also must be maintained in accordance with the ADA’s confidentiality requirements (see 29 CFR 1630.14(c)(1)), except that:

1. Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
2. First aid and safety personnel may be informed (when appropriate) if the employee’s physical or medical condition might require emergency treatment; and
3. Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request. 29 C.F.R. § 825.500(g).

If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA shall be maintained in accordance with the confidentiality requirements of Title II of GINA (see 29 CFR 1635.9), which permit such information to be disclosed consistent with the requirements of FMLA, stated above.


Interaction with Tennessee's Parental Leave Act

Reference Number: CTAS-1046

Tennessee has a parental leave law (T.C.A. § 4-21-408) that applies to all employers who employ 100 or more full-time employees at a job site or location. This state law allows both male and female employees to take up to four months off for adoption, pregnancy, childbirth and nursing an infant, as long as the employee has been employed for 12 months. The leave may be with or without pay, at the option of the employer. This law requires that the employee give at least three months advance notice, except in cases of medical emergency.

The FMLA does not supersede the Tennessee law, since the Tennessee law provides greater benefits. Therefore, if you have 100 or more employees, and an employee gives at least three months’ advance notice, you must allow the employee to take leave up to a total of four months (which can include the 12 workweeks of FMLA leave) for adoption, pregnancy, childbirth and nursing an infant. Note that under Tennessee’s law the employee may choose to begin leave before the birth of the child; for adoption the four-month period begins at the time the employee receives custody of the child. For a discussion of the interaction of the state law with the FMLA, see Op. Tenn. Att’y Gen. 94-006 (1/13/94).

Public Employee Political Activity

Reference Number: CTAS-126

The First Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment to the United States Constitution, guarantees the right of political expression and association, and a lawsuit may be brought under 42 U.S.C. § 1983 if a public employee is discharged, demoted, or otherwise subjected to punishment in retaliation for the exercise of the employee’s constitutional rights to political expression and association. See,
There is a very limited exception to this rule. The Supreme Court has recognized that the government has an interest in securing employees who will loyally implement the policies of its democratically elected officials. In Elrod v. Burns, 427 U.S. 347 (1976), the Court found that politically loyal employees are necessary "to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate."

While political patronage dismissals normally violate the First Amendment, the Court has recognized an exception that termination of public employees in policymaking or confidential positions may be based solely on political affiliation without violating the First Amendment. Id.; Branti v. Finkel, 445 U.S. 507 (1980). This exception is a very narrow one and applies to only a few county employees. An examination of the nature of the employee's responsibilities on a case-by-case basis is necessary. Several cases have been decided by the Sixth Circuit Court of Appeals that illustrate the limited nature of this exception: Hager v. Pike County Board of Education, 286 F.3d 366 (6th Cir. 2001) (teacher not within exception); Heggen v. Lee, 284 F.3d 675 (6th Cir. 2002) (deputy sheriffs not within exception); York v. Purkey, 2001 WL 845554 (6th Cir. 2001) (sheriff's employees not within exception); Rose v. Stephens, 291 F.3d 917 (6th Cir. 2002) (state police commissioner fell within exception); Justice v. Pike Co. Board of Education, 348 F.3d 554 (6th Cir. 2003) (teacher not within exception); Summe v. Kenton County Clerk's Office, 604 F.3d 257 (6th Cir. 2010) (chief deputy county clerk fell within exception); Ray v. Davis, 528 Fed. Appx. 453 (6th Cir. 2013) (business manager for county trustee fell within exception); Peterson v. Dean, 777 F.3d 334 (6th Cir. 2015) (county administrators of elections fell within exception).

County officials newly elected to office often want to terminate some or all of the employees in the office they are assuming. Such officials would be well advised to take some time to evaluate the office and the workload of the employees, then make a determination as to the staffing arrangements that the official believes will best enable the office to run efficiently. The official also should observe the skills and work habits of the employees. If the evaluation reveals that personnel changes need to be made, then the decision must be made on the basis of good management practices and not the political views or association of the individuals employed there. If the official believes that one or more employees are in policymaking or confidential positions, then the duties and responsibilities of the employees in question should be reviewed with the county attorney, taking into account the current case law on this topic, to make a determination as to whether those individuals fall under the exception.

Newly elected officials often want to terminate all employees and have them apply for employment, believing that this will eliminate First Amendment issues. However, a refusal to rehire is not treated any differently than a termination for purposes of First Amendment analysis. See Heggen v. Lee, 284 F.3d 675 (6th Cir. 2002).

State law also contains provisions protecting the rights of public employees to participate in political activity. Under T.C.A. § 7-51-1501, local government employees have the same rights as other citizens of Tennessee to run for public office and to participate in political activities, as long as the employee is not on paid time. The employee's time off for such purposes is limited to earned days off, vacation days, or any other arrangements worked out between the employee and the local governing body, pursuant to T.C.A. § 7-51-1503. Although there are no published court cases interpreting T.C.A. § 7-51-1501 at the time of this publication, the language of the statute appears to indicate that a county employee cannot be terminated simply for becoming a candidate for public office.

Conversely, state and federal laws contain provisions restricting political activity by certain county employees. One state law provision is the County Sheriff's Civil Service Law of 1974. T.C.A. §§ 8-8-401, et seq. The County Sheriff’s Civil Service Law of 1974 is an optional law that only applies in a county if adopted by the county legislative body by a two-thirds vote. T.C.A. § 8-8-402. The law provides in T.C.A. § 8-8-419:

(a)(1) No person holding a position in the classified service shall take an active part in any political campaign while on duty.

(2)(A) No employee of the sheriff's department shall solicit money for political campaigns; provided, that such restriction shall not prohibit an employee, including a deputy sheriff,
who is running for an elected office from soliciting and accepting campaign contributions for such person's own election campaign if the person is not on duty or in uniform when such activities occur.

(B) No employee of the sheriff's office shall make any public endorsement of any candidate in any campaign for elected office; provided that, if an employee or deputy sheriff is running for an elected office then such restriction shall not apply to that employee or deputy sheriff's own campaign.

(3) A deputy sheriff shall not use such position to reflect the deputy sheriff's personal political feelings as those of the sheriff's department or to exert any pressure on anyone to influence that person's political views.

(4) No employee while on duty, nor any officer while in uniform, shall display any political advertising or paraphernalia on such person's body or automobile.

(b) However, nothing in this part shall be construed to prohibit or prevent any such employee from becoming or continuing to be a member of a political club or organization and enjoying all the rights and privileges of such membership or from attending any political meetings, while not on duty. Such employee shall not be denied freedom in the casting of a vote.

(c) Any person violating the provisions of this section shall be dismissed from the service of the office of the sheriff.

Another law that restricts the political activity of certain county employees is the federal Hatch Act. The federal Hatch Act restricts the political activity of local government officials and employees who work in connection with programs financed in whole or in part by federal loans or grants. The act applies to a local government official or employee if the individual "performs duties in connection with an activity financed in whole or in part by federal funds." Special Counsel v. Gallagher, 44 M.S.P.R. 57, 61 (1990). If an individual meets this standard, the Hatch Act applies even if the person's salary does not include any federal funds.

On December 19, 2012, Congress passed the Hatch Act Modernization Act of 2012 (this Act became effective on January 27, 2013). The Modernization Act amended the Hatch Act to allow local government employees whose salaries are paid partially by federal funds to run for partisan office. Prior to this change, local government employees were prohibited from running for partisan office if they worked in connection with programs financed in whole or in part by federal loans or grants. With the change, the federal Hatch Act no longer prohibits local government employees from running for partisan office unless the employee’s salary is paid exclusively by federal loans or grants.

The Modernization Act did not change the federal Hatch Act’s prohibitions against using one’s official authority to affect the result of an election or coercing an employee to make a political contribution. A local government official or employee is still covered by these prohibitions if the individual works in connection with a program financed in whole or in part by federal loans or grants, even if the connection is relatively minor. A covered official or employee who runs for office would violate these provisions of the Hatch Act if the individual:

- uses any public funds to support his own candidacy;
- uses his office to support his candidacy, including by using official email, supplies, or other resources; or
- asks subordinates to volunteer for his campaign or contribute to the campaign.

The U.S. Office of Special Counsel (OSC) has exclusive jurisdiction to investigate and prosecute complaints alleging a violation of the Hatch Act. The OSC will issue advisory opinions to any person seeking advice about political activity under the Hatch Act. You may request such advice by phone, fax, mail or e-mail. The contact information for the OSC is listed below.

Hatch Act Unit
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
Personnel Policies
Reference Number: CTAS-176

Required Policies. State law requires that counties [1] have written personnel policies in place for all county employees covering four broad areas—(1) leave, (2) wage and hour, (3) non-discrimination and harassment, and (4) drug testing for those employees who are required by law to be tested. T.C.A. 5-23-104. These required policies may be adopted on a countywide basis, or they may be adopted to cover different offices separately.

Optional Policies. In addition to the required written policies, there are many other policies that a county official may wish to put in place for effective and efficient operation of his or her office. These administrative policies are left to the discretion of the county official. While a county official may agree to participate in uniform policies on these optional matters, these policies are not subject to the same procedures for their adoption as are the required written personnel policies, and the official is free to change these optional policies at will. As with all personnel policies, however, an official should place a statement in the policies that lets employees know that the policies are subject to change and do not create any contractual obligation or other expectation of their continuation. [2]

[1] This law does not apply to any county with a population over 800,000 (Shelby County) or to any county with a metropolitan form of government (currently, Davidson, Moore and Trousdale counties). There are no other exceptions.

[2] See Williams v. City of Milan, 2009 WL 989775 (W.D. Tenn. 2009). State law provides that any and all personnel policies governing county employees shall be subject to change at any time, and shall not give rise to any contractual rights or obligations between the county and its employees. T.C.A. 5-23-106.

Required Personnel Policies
Reference Number: CTAS-1097

State law, found at T.C.A. 5-23-101 et seq., requires that each county [1] have written personnel policies in place covering all county employees on four broad topics. Copies of these policies are filed with the county legislative body and are maintained in the county clerk’s office. The law requiring written personnel policies covers only the specified four topics; any other policies a county employer may have or wish to adopt are outside the scope of this law. The four topics are:

1. Leave Policies
2. Wage & Hour Policies
3. Anti-discrimination and Sexual Harassment Policies
4. Drug Testing Policy (only for CDL drivers)

All “county officials” (defined in T.C.A. 5-23-102 as county trustees, registers of deeds, county clerks, judges who employ county employees, clerks of court, sheriffs, assessors, boards of education, and the chief administrative officer of the highway or public works department; also county mayors who choose to adopt separate policies under T.C.A. § 5-23-103(e)) are required to either (1) adopt written personnel policies on the four required topics to govern the employees of their respective offices or departments, or (2) be governed by policies adopted by the county legislative body and the county mayor, which policies govern all county employees who are not
covered by separate policies.  

[1] This law does not apply to any county with a population over 800,000 (Shelby County) or to any county with a metropolitan form of government (currently, Davidson, Moore and Trousdale counties). There are no other exceptions.

[2] Officials and department heads that are not included in the definition of “county officials” in T.C.A. 5-23-102 cannot adopt separate policies. See T.C.A. 5-23-103.

Leave Policies

Reference Number: CTAS-1099

Under T.C.A. 5-23-104(a), counties are required to have written policies stating "whether employees are entitled to paid vacation or annual leave, sick leave or other leave, policies for accrual and use of such leave, policies for compliance with state and federal family and medical leave laws and provisions for maintaining leave records."

There are two kinds of leave: (1) leave that employers are required by law to give, and (2) leave that is left to the discretion of the employer. Leave that falls in the “required” category includes leave under the FMLA, the state’s parental leave law, and some miscellaneous leave laws.

Both the FMLA and the state parental leave law require only unpaid leave. An employer may choose to give paid leave, but it is not mandated. The policy should cover all issues, including what 12-month period will be used, whether employees will be required to take accrued paid leave before taking unpaid leave or whether the employee will be able to choose, how employees make a request for leave, and how insurance payments are handled while the employee is on leave. It is suggested that a copy of the FMLA Fact Sheet be included in the policies to ensure that employees are given the required notice of their rights under the FMLA.

The Tennessee parental leave law entitles a female employee to take up to four months of leave for pregnancy, childbirth and nursing an infant. Unless the employer wants to give 12 weeks under the FMLA and another four months under this state law, the policy should state that the FMLA leave and state parental leave entitlements will run concurrently, so that employees receive a total of four months under both laws combined.

There are a few other miscellaneous leave provisions required by state and federal law that will need to be included in the policies. These are jury and court duty, voting leave, military leave and Workers’ compensation (in-line-of-duty injury) leave.

The policies also must set out any other types of leave that are given. These include sick leave, vacation, personal leave, administrative leave and any other kinds of leave that employees are allowed to take. The policies should state whether the leave is paid or unpaid, how it accrues, whether it carries over to the next year if it is not used, whether there is a maximum amount an employee can accrue, and whether employees are entitled to payment for unused accrued leave when their employment terminates for any reason.

The policies should set out the procedure for requesting and using leave. Also, the policies are required to set out the procedures used to keep records of employee leave.

Wage and Hour Policies

Reference Number: CTAS-1100

Under T.C.A. 5-23-104, the county must have written policies covering "the compensatory time policy in effect for the office or department or a statement that no compensatory time is allowed, a statement of whether the salary received by salaried employees is intended to cover all hours worked up to and including 40 hours in a workweek in offices or departments where the regular workweek is less than 40 hours, policies for maintaining compliance with the overtime provisions of the federal wage and hour laws, and provisions for recordkeeping."

These policies cover the requirements of the federal Fair Labor Standards Act (FLSA).
The policies must define the workweek—when it begins and ends, and the number of hours in the regular workweek. If the regular workweek is less than 40 hours, the employer will need to state whether the salary paid to salaried non-exempt employees is intended to cover just those hours in the regular workweek or whether it covers all hours the employee may work up to and including 40 in the workweek. This is a general policy that establishes the workweek for overtime purposes. It does not set individual work schedules—these should be set by the employee’s supervisor.

The policies must include overtime and compensatory time policies. The policies should state whether employees are required to receive approval in advance before working overtime; whether employees who work overtime will be paid in cash or whether they will receive compensatory time off; the procedure for requesting and using comp time; and the maximum amount of comp time an employee can accrue (the federally prescribed maximum is 240 hours for most employees but public safety employees may accrue up to 480 hours). Remember that compensatory time can only be given if there is a voluntary agreement or understanding with the employees that they are willing to accept compensatory time. If compensatory time is not used, employees must be paid overtime for time worked in excess of 40 hours in the workweek and the policy should so state.

Finally, the policies must provide for the recordkeeping procedures for wage and hour purposes.

Sample time record forms

[1] If the salary does not cover all hours worked up to and including 40 in the workweek, then the employer must compensate the employee at the employee’s regular rate of pay for any hours worked over the number of hours in the regular workweek up to and including 40, then at the overtime rate for any hours over 40.

Non-discrimination and Sexual Harassment Policies

Reference Number: CTAS-1101

Under T.C.A. § 5-23-104, the county’s personnel policies must include “policies on non-discrimination and sexual harassment, including a complaint procedure as required under the federal Americans with Disabilities Act, and guidelines to enable compliance with the fair hiring requirements of the federal equal employment opportunity laws and regulations.”[1]

These policies should include a general statement that the employer does not unlawfully discriminate in employment matters and that illegal discrimination in the workplace will not be tolerated. The policies also should provide some guidelines about hiring practices, such as whether job openings will be posted or advertised, how applications are accepted and any other measures to avoid any appearance of discrimination. Even though the statute only specifically addresses sexual harassment, it is recommended that the policies address all forms of illegal harassment since they are all forms of illegal discrimination. Finally, the policies should provide a statement advising employees what they should do if they believe they have been the subject of unlawful discrimination. Someone should be designated to receive complaints of perceived discrimination/harassment, and an alternate person should be designated in the event that the complainant for some reason feels uncomfortable talking with the first designee (for example, where the person designated to receive complaints is the alleged harasser, the employee should not be expected to make the complaint to him or her). For purposes of the Americans with Disabilities Act (ADA), the person also should be advised to see the county’s ADA Coordinator if the problem is not resolved within the office. It is recommended for most counties that they NOT enact a detailed grievance procedure with hearings, findings and complicated processes that the county is not equipped to administer. The purpose of the complaint process is to provide a mechanism for the county to be aware of problems and to make an attempt to remedy the situation before it gets out of hand. All that is needed is the name of a few persons to whom problems should be brought. Choose someone with sound judgment and leave it up to that person to determine the best way to handle the situation. Do not make complicated procedures that cannot or will not be followed. Lawsuits often include allegations that the employer failed to follow its own policies. On the other hand, lawsuits can be based on the employer’s failure to take timely and appropriate action once a complaint has been brought to their attention, so the employer should ensure that the person designated will take appropriate steps to resolve the problem.
For employees of county judges, procedures administered by the administrative office of the courts for complaints under the Americans with Disabilities Act may be used, if available.

Drug and Alcohol Testing Policies

Reference Number: CTAS-1102

Under T.C.A. § 5-23-104, the county's personnel policies are required to contain "for any employees who are required by law to be tested, policies and procedures for drug and/or alcohol testing."

Before doing anything on this topic, one question should be answered: Are any employees required to have a commercial driver's license (CDL) to perform their duties? If the answer is no, you are not required to test any of your employees and no policy is required under this act.[1] If the answer is yes, then you are required under federal law to have a testing program in place already for your CDL drivers. These policies must be carefully drafted to comply with the state and federal constitutions, as well as the federal law and regulations. It is strongly recommended that counties hire experts in this field to handle the testing program and to assist them in preparing these policies.

Sample Request for Proposals (RFP) to solicit bids for a Drug Testing Program

[1] If you do have a drug testing program in place for any of your employees who are not required to have a CDL, please review Governmental Employee Drug Testing-The Constitutional Issues.

Adoption of Required Policies

Reference Number: CTAS-2048

Adoption of Required Policies by County Officials

Reference Number: CTAS-1098

Each county official (defined in T.C.A. § 5-23-102 as county trustees, registers of deeds, county clerks, judges who employ county employees, clerks of court, sheriffs, assessors, boards of education, and the chief administrative officer of the highway or public works department; this also includes county mayors who choose to adopt separate policies under T.C.A. § 5-23-103(e)) must determine whether he or she wants to adopt policies separately from the rest of the county, or whether it would be better to be governed by the policies adopted by the county legislative body.

There are several things to consider in making this decision. Probably the most important consideration is the method the county mayor and the county legislative body choose for dealing with the countywide policies. Is the need recognized for each affected office to have input and to participate in the process? Does the county already have countywide policies in place that are working? A positive answer to either of these questions points toward joining the rest of the county. It is often helpful to have a single set of policies that cover all county employees. On the other hand, if an office is different in some way that affects the basic policies that are needed and these issues are not adequately addressed by the countywide policies, then the official may want to prepare separate policies.

If a county official chooses to prepare separate policies, the policies are required to be reviewed for compliance with the law by an attorney appointed by the county mayor with the approval of the county legislative body, and then the approved policies must be presented to the county legislative body to be included in the minutes and filed in the office of the county clerk. These policies are not subject to approval by the county legislative body. The procedure is set out in T.C.A. § 5-23-103.

If a county official chooses not to adopt separate policies for his or her office, that official's office will be covered by the policies adopted by the county legislative body and the county mayor for all other county employees.
Adoption of Required Policies by County Mayor/County Legislative Body

Reference Number: CTAS-1106
For all county offices that are not covered by separate policies authorized in T.C.A. § 5-23-103, the county legislative body and the county mayor each have responsibilities in connection with the adoption of personnel policies on the four required topics. The procedures are set out in T.C.A. § 5-23-103 and include the following:

- The county mayor, with confirmation of the county legislative body, designates an attorney to review all policies for compliance with the law.
- The county mayor prepares a list of all offices and departments to be governed by the policies, which includes all departments, agencies and boards whose funds are handled by the county trustee (except those filing separate policies), and submits the list to the attorney for review and to the county legislative body for approval.
- The policies may be prepared by one person or several, appointed by the county mayor with confirmation by the county legislative body. The act is very flexible in this regard: one person could be appointed to compile all of the policies, or one person from each office or department on the list could be appointed to a committee, or each office could be directed to develop its own set of policies to be submitted to the county legislative body for review and approval, or some other method could be used.
- When the policies have been prepared, they must be reviewed and approved for compliance with the law by the designated attorney.
- The approved policies must be submitted to and approved by the county legislative body and included in its minutes, and filed in the office of the county clerk.

When making the list of which departments and agencies the policies will govern, there may be some that seem to be hybrid organizations (for example, joint city-county library boards, county health departments, etc.). For these entities, look at the documents under which the entity was formed. If the contracts, resolutions, or other written materials do not state who is considered the employer of the employees of that entity, the county should go back and make some provision for this (i.e., amend the resolution or contract). This provision is important for liability and other purposes, in addition to the personnel policies.

Attorney Review

Reference Number: CTAS-1107
The county mayor is required to retain, subject to confirmation of the county legislative body, an attorney to review all of the policies that are adopted under this law. The attorney is to review the policies for compliance with this law and with other applicable laws. The county attorney may be retained for this purpose, or the county may retain some other attorney with appropriate expertise. The compensation of the attorney is established by the county legislative body and paid out of the general fund.

This attorney is responsible for reviewing the separate policies adopted by the county officials as well as the countywide policies. The attorney also reviews the list of offices and departments covered by the countywide policies. The board of education is authorized to employ its own attorney. T.C.A. §§ 5-23-103 and 5-23-105.

If a county official filing separate policies disagrees with the designated attorney’s conclusion, there is a provision in the act allowing the official to have the policies reviewed by another attorney selected by the official and paid from the fees of the office or from funds budgeted for that office. T.C.A. § 5-23-103.

Approval and Filing of the Policies

Reference Number: CTAS-1110
When the policies have been prepared, they must be sent to the designated attorney for review for compliance with the law.
When the attorney is satisfied that the policies are in compliance with the law, they are submitted to the county legislative body. Depending on the type of policy, the county legislative body either approves the policies or notes their filing, as follows:

- **Countywide policies** must be submitted to the county legislative body for approval. The county legislative body must approve or disapprove the policies as a whole. The county legislative body cannot make changes in individual policies. If the county legislative body disapproves the policies, they must be sent back to the person or group who prepared them for revision and re-submission to the county legislative body for approval. The designated attorney must review any changes as well. The policies must be approved by the county legislative body and filed in the minutes in the office of the county clerk.

- **Individual office policies** adopted separately by county officials are filed with the county legislative body but are not required to be approved by the county legislative body. These separate policies prepared by county officials are submitted only for inclusion in the minutes to be filed in the county clerk’s office. The only reason for not accepting these policies for inclusion in the minutes would be failure to obtain the required review and approval of the attorney.

### Amendment of Policies

**Reference Number: CTAS-2078**

Once adopted and approved, personnel policies may be amended, modified, or repealed at any time by the same process used for the original adoption of the policies. Any personnel policies governing county employees shall be subject to change at any time, and shall not give rise to any contractual rights between the county and its employees. T.C.A. § 5-23-106.

### Policy Preparation Tips and Suggestions

**Reference Number: CTAS-1111**

This process will work best with the cooperation of all parties involved. The officials, department heads and supervisors whose offices will be governed by these policies must be given an opportunity to provide the necessary information and input to enable the preparation of practical and workable policies. Lawsuits often result when an employer fails to follow its own policies.

The objective is to have minimum policies in place to enable the county to comply with existing law. The purpose is not to micro-manage offices or departments. The only policies authorized are those listed in the act (leave, wage and hour, anti-discrimination and sexual harassment, and required drug testing). All other personnel policies remain the responsibility of the individual under whose direction the employees work.

Any policies that are not in one of the four required categories are outside the scope of this law and should remain within the official’s office. They should not be filed with the county legislative body.

In making the decision whether to file separate policies, the official should consider the advantages to having one set of policies for all of the employees of the county. For instance, employees may be happier knowing that they are receiving the same benefits as other county employees, and there will be less jealousy between county employees working in different offices. Most of the policies on the required topics throughout the county probably will be similar, with only a few differences. There will be variations, for example, in the overtime policies for the sheriff’s office because the overtime law is different for law enforcement employees. Countywide policies can take into account these variations, noting any different provisions that apply to particular offices. Also, with the limitation on the scope of the policies under the act, the county legislative body cannot establish the hours the official’s office is open or the actual hours each official’s employees are required to work, nor can they make hiring and firing decisions for the official. These remain the responsibility of the official, and this authority is not relinquished if an official decides to come under the countywide policies. The policies under this act are limited to such general things as establishing the number of hours in a regular workweek, and if the workweek is less than 40 hours, stating whether the salary paid to non-exempt salaried employees is intended to cover all hours worked up to and including 40. They also set overtime policies, which for most offices will be the same. As long as the county mayor and county legislative body allow the official to participate in the preparation of the policies and are willing to
work with the officials and department heads within the county to arrive at policies that are workable and everyone is reasonably pleased, there are many advantages to policies of countywide application. Finally, the act allows an official to withdraw from the countywide policies if he or she later becomes dissatisfied.

Statutory Responsibilities

Reference Number: CTAS-1112

County officials having some statutory duties related to distribution of information about personnel policies, recordkeeping, and enforcement of the policies.

Distribution of Required Information and Other Duties

Reference Number: CTAS-1105

Each county official and each department head within the county responsible, with respect to the employees of that office or department, is responsible for the following:

1. Ensuring that each employee under his or her direction has received a copy of the personnel policies in effect for that office, including a statement that nothing in the policies is intended to create a contract of employment or to affect the employment-at-will status of county employees, and a statement for each employee to sign acknowledging receipt of a copy of the policies for that employee’s office or department and acknowledging that the employee understands that subsequent amendments will be on file at the office of the county clerk.

2. Furnishing to each employee a copy of T.C.A. § 39-16-504, relative to falsifying, destroying or tampering with governmental records.

3. Maintaining all required personnel records, including but not limited to the form I-9 required under federal immigration laws and all wage and hour records required under state or federal law, unless such records are maintained in a central payroll office within the county.

4. Ensuring that all posters and other employee notifications required by the federal Fair Labor Standards Act, the Family and Medical Leave Act, applicable equal employment opportunity laws, and other applicable state or federal laws have been posted or otherwise given to employees. The posters and other helpful information can be obtained free of charge from the federal Department of Labor (DOL) Wage & Hour Division office and Equal Employment Opportunity Commission (EEOC) office nearest your county.

Each official and department head should determine which employees are considered employees of their offices and make certain that the above requirements have been met for each of those employees. While this is not required, it would be a good idea for the county mayor or the county legislative body to send a notice to each official and department head within the county advising them of their responsibilities.

Recordkeeping Requirements

Reference Number: CTAS-1113

T.C.A. § 5-23-101 et seq. makes each county official and department head responsible for maintaining personnel records for employees under their direction, unless they are in a county in which these records are maintained centrally. There are numerous personnel records that must be maintained. Some of these are discussed below.

For non-exempt employees, the FLSA requires the following records to be maintained and preserved:

1. Name in full;
2. Home address;
3. Date of birth if under age 19;
4. Sex;
5. Occupation in which employed;
6. Time and day of the week on which the employee’s workweek begins;
7. Regular hourly rate of pay for any workweek in which overtime compensation is due, in accordance with the FLSA’s requirements; an explanation of the basis of pay, indicating the monetary amount paid per hour, day, week or other basis; amount and nature of each payment excluded from the employee’s regular rate;

8. Regular hours worked each workday and total regular hours worked each workweek;

9. Total daily or weekly straight-time earnings or wages due for each workday or workweek, exclusive of overtime compensation;

10. Total premium pay for overtime hours;

11. Total additions or deductions from wages paid each pay period;

12. Total wages paid each pay period; and

13. Date of payment and pay period covered by such payment.

For exempt employees, employers are required to maintain and preserve records containing all the information and data previously set forth, with the exception of the data required in items 7 through 11. In addition, wage records must be maintained in sufficient detail to permit calculation for each pay period of the employee’s total remuneration, including fringe benefits and perquisites.

If compensatory time is used, additional records must be kept detailing its accrual and use.

Recordkeeping under FLSA

Recordkeeping under FMLA

In order to show that employees are lawfully eligible to work in the United States, the federal Immigration Reform and Control Act of 1986 requires employers to maintain a completed Form I-9 for each employee.

Enforcement Provisions

Reference Number: CTAS-1114

To enforce the provisions of the act, the county mayor is authorized to retain the county attorney, or an attorney hired pursuant to T.C.A. § 5-6-106, to file an action in court for a writ of mandamus to compel compliance as provided in T.C.A. § 5-1-107. In addition to the action for mandamus, the county mayor is authorized to pursue any and all other remedies that may be available at law or in equity. This could include making a claim under the county official’s bond.

If a court finds a county liable as a result of acts or omissions by any official or employee in connection with the requirements of this act or any policies adopted pursuant to this act, the county has a right of action for reimbursement against the official or employee whose conduct resulted in liability for the county that is not covered by insurance, if the conduct of the official or employee was intentional and knowing.

Sample Personnel Policies

Reference Number: CTAS-1115

Following are samples of various personnel policies that may be used as guides to assist county officials in developing their own personnel policies. These are only examples—there are many other acceptable ways to do these policies and many other choices can be made. Always make sure that the policy accurately reflects what is done or will be done in the county and in the particular office to which it applies. Never adopt a policy that will not or cannot be followed. Consult with the county attorney to ensure that all policies are in compliance with the applicable law.

Introductory Matters

Personnel policies often use terminology that needs to be defined, such as “part-time employee” and the like. These definitions usually appear at the beginning of a personnel handbook, but they also can be placed within the policies where the terms are actually used. Regardless of where the definitions appear, it is very important to define them. When defining categories of employees, avoid referring to employees as “permanent” which could create the implication that the employee
cannot be fired except under limited circumstances. A better alternative is "regular." The term "probationary" also can lead to the inference that an employee who has completed this period will not be fired, although if you carefully set out the terms of probationary employment (such as no accrual of benefits) this term may be used. However, you might want to call these employees "newly hired." Also, remember that definitions are not policies—they are only used to define terms that you will later use in your policies. The following are only examples of terms that you may need to define. Do not define terms unless they are actually used in your policies.

Definitions

"Full-Time Regular Employees" are those who are hired to work the county’s normal, full time, _________ (___) hour workweek on a regular basis. These employees may be "exempt" or "non-exempt" as defined below.

"Part-Time Regular Employees" are those who are hired to work fewer than _________ (___) hours per week on a regular basis. These employees may be "exempt" or "non-exempt" as defined below.

"Temporary Employees" are those who are engaged to work either full time or part time with the understanding that their employment will terminate upon the completion of a specific assignment. These employees may be "exempt" or "non-exempt" as defined below.

"Exempt Employees" are those who are not entitled to be paid overtime under federal wage and hour laws. Executive employees, professional employees and certain employees in administrative positions are typically exempt.

"Non-exempt Employees" are those who are required to be paid overtime at time and one-half their regular rate of pay, in accordance with federal wage and hour laws, for hours worked over forty (40) in a workweek.

"Newly Hired Employees" are those who have been employed by the county for less than _________ (___) months. These employees accrue no benefits. They may be either "exempt" or "non-exempt."

Employment at Will Statement

You also should include an employment-at-will statement at the beginning of the personnel handbook. It is important that employees be told that the policies do not create a contract of employment. [1]

No policy, benefit, or procedure contained herein creates an employment contract for any period of time, or a contractual obligation of any kind. All employees will be considered employees-at-will. Employees may be terminated for failure to satisfactorily perform their duties or simply at the will of the employer, but they shall not be terminated for an illegal purpose.

Miscellaneous Sample Policies

The following policies address miscellaneous issues that the employer may want to include in a personnel handbook.

Residency Requirement

All new employees shall be residents of __________ County or shall become residents of __________ County within six (6) months after employment. Any applicant for employment residing outside __________ County must sign a statement prior to gaining employment status indicating the employee’s willingness to move his or her place of residence. Employees of __________ County must continue to reside within __________ County as long as their employment continues.

All employees of __________ County, employed as of the effective date of this residency requirement, shall be allowed to maintain their existing residences and shall not be required to move into __________ County. Upon moving from the residence an employee maintained as of the effective date of this requirement, the employee must move into __________ County, as provided by these rules and regulations. All employees are required to furnish their employer with notice of a change of address within thirty (30) calendar days of locating to a new residence.
Personnel Files

An individualized personnel file will be maintained on each employee. It is the responsibility of each employee to provide accurate information to the employer. Employees also are responsible for reporting to the employer any change in the information that they have previously provided. Providing false information is a misdemeanor under T.C.A. § 39-16-504.

Immigration Papers

Upon initial employment, all employees are required to complete a Form I-9 to attest that they are lawfully eligible to work in the United States. Employees are further required to supply to the employer copies of documents proving this eligibility.

Part-Time Employees

Part-time employees [defined in the definitions section] are not entitled to receive any benefits set out in the policies of ________County except where expressly and specifically provided otherwise. These policies are not intended to establish paid leave of any kind for part-time employees.

Breaks

Employees may take one (1) fifteen (15) minute rest period for each four (4) hours worked. Such rest periods shall be considered a privilege and not a right, and shall never interfere with proper performance of the work responsibilities and work schedule of each department. Break time shall not reduce working time under FLSA.

Compensation Plan

The compensation plan of this office or department is established by assigning each job classification a salary grade which reflects the knowledge, skills and abilities needed to fill that position. Each employee will be compensated based upon the salary grade that is assigned to his or her position. No full-time employee shall be paid at a rate less than the base rate nor more than the maximum rate for a position as set out in the compensation plan.

The compensation plan establishes a salary range within each job. It is designed to provide for merit pay increases to employees as a reward for ability and performance and to compensate employees for their increased value to this county.

Merit pay increases are not automatic. Increases will be granted only upon the recommendations of the employer and will be based upon the ability and performance of the employee.

Termination Pay

An employee whose services are being terminated, either voluntarily or involuntarily, shall be paid for all regular earnings that are due and accrued plus all accrued vacation time, overtime and compensatory time. The employee will not be compensated for any unused sick leave days. In the event of death, the amount owing to the employee shall be paid to the employee’s beneficiary designated in writing for this purpose. If no beneficiary has been designated, amounts owing at the time of death will be paid to the surviving spouse, surviving children, or to the estate, as may be required by law.

COBRA

An individual covered by the employee health plan has the right to seek continued health coverage upon the occurrence of certain events, such as termination of employment, which might affect that individual’s coverage. The employee or covered individual should consult the health care plan administrator.

Sample Leave Policies

Reference Number: CTAS-1116
Following are some examples of policies that you may use as guides to help you define the leave that employees receive in your particular county.

Sample Policy - Holidays

Reference Number: CTAS-1117
Sample Holiday Policy:

1. Holidays - On the following legal holidays, county offices will be closed and employees will be excused from work without charge to leave:

   - New Year’s Day: January 1st
   - Martin Luther King, Jr. Day: 3rd Monday in January
   - Presidents’ Day: 3rd Monday in February
   - Good Friday: Friday before Easter
   - Memorial Day: Last Monday in May
   - Independence Day: July 4th
   - Thanksgiving Day: 4th Thursday in November
   - Christmas Day: December 25th

   When a holiday falls on Saturday, the Friday prior to the holiday is substituted. When a holiday falls on Sunday, the Monday following the holiday is substituted.

2. Election days - County offices will be closed and employees excused from work without charge to leave on all days established by law for holding county, state or national elections throughout the state.

3. Special Pay Provisions - Every effort will be made to allow all employees off on each designated holiday and Election Day. If it is necessary for an employee to work on any of these days, the employee will be compensated at the employee’s regular rate of pay, and the employee will receive one and one-half hours of vacation time for each hour actually worked during the holiday.

Sample Policy - Sick Leave

Reference Number: CTAS-1118
Sample Sick Leave Policy:

A. Earning and Accumulating Sick Days

   Sick leave shall be considered a benefit and privilege and not a right. Full time employees will receive full pay during incapacity caused by illness if sick leave is taken. Sick leave is earned at the rate of one day per month (12 days per year). There is no maximum accumulation of sick leave credits. Accumulated sick leave has no value except for the purpose granted, and in the event of retirement or separation, all unused sick leave shall be forfeited.

   If an employee is in a paid status for one-half of the month or more, he or she will be credited with one day of sick leave for the month. Otherwise, the employee will not accrue any time for the month.

B. General Sick Leave Rules and Procedures

   1. Use of Sick Leave - An employee may use sick leave allowance for absence due to the employee’s own illness or injury. Sick leave also may be used for appointments with a licensed doctor, dentist or recognized practitioners.
When appropriate, a partial sick day may be used rather than a full day. Employees who become ill during the period of their vacation may request that their vacation be temporarily terminated and the time changed to sick leave. However, such request must be justified by means of a doctor’s statement upon return to work. No employee may give or loan sick leave time to another employee.

2. Documentation of Sick Leave - Employees are required to notify the employer as early as possible on the first day of their sick leave absence, and shall notify the employer in advance whenever the need for leave is foreseeable. Employees shall document their use of paid sick leave on leave request forms provided by the Employer for this purpose. Such forms shall be completed by the employee and approved by the employer in advance of the leave when the need for sick leave is foreseeable, and in all other instances as soon as possible after the employee’s return to work. An employee who claims sick leave may, at the discretion of the employer, be required to furnish a certificate from a physician stating that the employee was incapacitated from work for the period of absence as a result of sickness or injury, and that the employee is again physically able to perform his or her duties.

3. Exhaustion of Sick Leave - Employees who have used all of their accumulated sick leave will not receive financial compensation for additional days needed due to illness or injury. For any additional time needed, the employee will be considered on a leave without pay status unless the employee has accumulated vacation time or comp time remaining and the employee requests such leave.

Sample Policy - Vacation/Annual Leave

Reference Number: CTAS-1119
Sample Vacation/Annual Leave Policy:

Qualification for Vacation Time - Full time employees (those who work more than 35 hours per week) will earn twelve (12) days of paid vacation per year. Employees begin accruing vacation time as of the date of their employment, but an employee is not eligible to use vacation time until the employee has completed six months of service, at which time six (6) days of vacation will be available. Thereafter, employees will accrue vacation days at the rate of one day per month of service. Part-time employees do not qualify for vacation leave.

Accumulation of Vacation Time - Vacation time may be accumulated and carried forward to the next year in an amount not to exceed 24 days. Any days exceeding the 24-day limit will be lost if not used prior to the end of the current employment year.

Use of Vacation Time - Vacation leave may be used only at times approved in advance by the employer. Requests for vacation leave shall be made using leave request forms provided by the employer for this purpose. Reasonable vacation requests will be honored to the extent possible. If two or more employees request vacation for the same period of time, the employer will determine whether this will create a hardship upon the department. If it is determined that it is not possible for both employees to be on vacation at the same time, the request of the employee who first asked for vacation time will be honored. No employee may give or loan vacation time to another employee.

Termination of Employment - Upon the termination of employment, an employee shall be entitled to payment for any unused vacation time which has accrued, up to the 24-day limit. Payment shall be made based upon the employee’s daily rate of compensation at the time of termination.

Sample Policy - Personal Leave

Reference Number: CTAS-1120
“Personal Leave” is an example of a combination leave which is sometimes given by employers instead of sick leave, vacations, personal days, and other kinds of leave. It is said to result in
lower absenteeism.

Sample Personal Leave Policy:

In lieu of sick leave, vacation leave and other types of leave for specific reasons, employees receive paid personal leave which may be used for any reason. The amount of personal leave to which you are entitled depends on your status as an exempt or non-exempt employee, as defined in these policies, and on your length of service with the county, as follows:

**Full-Time Regular Non-exempt Employees**

<table>
<thead>
<tr>
<th>Years Service of as of July 1</th>
<th>Annual Personal Leave Allowance</th>
<th>Monthly Accrual</th>
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**Full-Time Regular Exempt Employees**

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<th>Years Service of as of July 1</th>
<th>Annual Personal Leave Allowance</th>
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Part-time regular employees accrue personal leave on schedules proportionate to the above, but one day of leave will be equal to the number of hours the employee is regularly to work per day, so that when taking leave these employees will be paid only for the number of hours they would normally be scheduled to work during that period.

Newly hired regular employees do not accrue any personal leave until they have successfully completed six months of continuous employment, at which time one-half their first year’s personal leave will accrue. The balance of the first year’s personal leave will accrue upon successful completion of one year of continuous employment.

Temporary employees do not accrue personal leave or any other type of leave except to the extent required by applicable law or as may be specified in such employee’s written contract with the county.

Employees will not be paid for unused personal leave.

**Sample Policy - Pregnancy Leave**

Reference Number: CTAS-1121

Sample Pregnancy Leave Policy:

Pregnancy, childbirth and related conditions will be treated the same as any other temporary medical disability with regard to leave policies. Leave is available under the same terms and conditions as for other similar purposes. In addition to sick leave and annual leave, leave related to pregnancy and childbirth also may be available to eligible employees under the federal Family and Medical Leave Act and/or Tennessee’s law governing adoption, pregnancy, childbirth and nursing.

Tennessee law requires that the following provisions be included in these personnel policies; the provisions may or may not apply, depending upon the circumstances:

T.C.A. 4-21-408. Leave for adoption, pregnancy, childbirth and infant nursing
(a) Employees who have been employed by the same employer for at least twelve (12) consecutive months as full-time employees, as determined by the employer at the job site
or location, may be absent from such employment for a period not to exceed four (4) months for adoption, pregnancy, childbirth and nursing an infant, where applicable, referred to as "leave" in this section. With regard to adoption, the four-month period shall begin at the time an employee receives custody of the child.

(b)(1) Employees who give at least three (3) months’ advance notice to their employer of their anticipated date of departure for such leave, their length of leave, and their intention to return to full-time employment after leave, shall be restored to their previous or similar positions with the same status, pay, length of service credit and seniority, wherever applicable, as of the date of their leave.

(2) Employees who are prevented from giving three (3) months’ advance notice because of a medical emergency that necessitates that leave begin earlier than originally anticipated shall not forfeit their rights and benefits under this section solely because of their failure to give three (3) months’ advance notice.

(3) Employees who are prevented from giving three (3) months’ advance notice because the notice of adoption was received less than three (3) months in advance shall not forfeit their rights and benefits under this section solely because of their failure to give three (3) month’s advance notice.

(c)(1) Leave may be with or without pay at the discretion of the employer. Such leave shall not affect the employees’ right to receive vacation time, sick leave, bonuses, advancement, seniority, length of service credit, benefits, plans or programs for which the employees were eligible at the date of their leave, and any other benefits or rights of their employment incident to the employees’ employment position; provided, that the employer need not provide for the cost of any benefits, plans or programs during the period of such leave, unless such employer so provides for all employees on leaves of absence.

(2) If an employee’s job position is so unique that the employer cannot, after reasonable efforts, fill that position temporarily, then the employer shall not be liable under this section for failure to reinstate the employee at the end of the leave period.

(3) The purpose of this section is to provide leave time to employees for adoption, pregnancy, childbirth and nursing the infant, where applicable; therefore, if an employer finds that the employee has utilized the period of leave to actively pursue other employment opportunities or if the employer finds that the employee has worked part time or full time for another employer during the period of leave, then the employer shall not be liable under this section for failure to reinstate the employee at the end of the leave.

(4) Whenever the employer shall determine that the employee will not be reinstated at the end of the leave because the employee’s position cannot be filled temporarily or because the employee has used the leave to pursue employment opportunities or to work for another employer, the employer shall so notify the employee.

(d) Nothing contained within the provisions of this section shall be construed to:

(1) Affect any bargaining agreement or company policy that provides for greater or additional benefits than those required under this section;

(2) Apply to any employer who employs fewer than one hundred (100) full-time employees on a permanent basis at the job site or location; or

(3) Diminish or restrict the rights of teachers to leave pursuant to title 49, chapter 5, part 7, or to return or to be reinstated after leave.

(e) The provisions of this section shall be included in the next employee handbook published by the employer after May 27, 2005.

Sample Policy - Family and Medical Leave

Reference Number: CTAS-1122
Sample FMLA Policy:

Under the federal Family and Medical Leave Act of 1993 (FMLA), eligible county employees are entitled to take up to twelve (12) workweeks of unpaid leave during each
12-month period beginning [insert one of the four 12-month periods chosen in accordance with the FMLA: the fiscal year, the calendar year, a "rolling" 12-month period measured backward from the date of the leave, or the 12-month period measured forward from the date of the leave] for the birth of a child, the placement of a child for adoption or foster care, a serious health condition of the employee that makes the employee unable to perform the functions of his or her job, or the serious health condition of a spouse, son, daughter or parent that requires the employee’s presence. Both male and female employees are eligible for leave in connection with the birth or placement of a child or a family illness, but special rules may apply if both husband and wife are county employees. Accrued paid leave may be substituted for unpaid FMLA leave in accordance with the county’s paid leave policies. Employees may be required to use their accrued paid leave prior to taking unpaid leave under the FMLA.

Eligible employees are those who have been employed by the county for at least 12 months, and who have worked at least 1,250 hours during the 12-month period immediately before leave is requested.

An employee must provide at least thirty (30) days advance notice of the need to take FMLA leave under normal circumstances. Medical certification also may be required.

Employees returning to work from FMLA leave will be restored to the same position or one with equivalent pay and benefits. Returning employees may be required to provide a certification of fitness for duty prior to being reinstated.

The FMLA also allows eligible employees to take up to twelve (12) workweeks of job-protected leave in the applicable 12-month period for a "qualifying exigency" arising out of the active duty or call to active duty status of a spouse, son, daughter, or parent, and up to 26 workweeks of job-protected leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. Advance notice is required – at least thirty (30) days for foreseeable planned medical treatment and otherwise as soon as practicable. Certification of the need for leave may be required.

It is the policy of ________County to grant its employees leave in accordance with the requirements of the Family and Medical Leave Act. A copy of the FMLA Fact Sheet #28 setting out the employee’s rights under the FMLA and Fact Sheet #28A setting out the employee’s rights to military family leave are attached [attach copies of both FMLA Fact Sheets] to these policies, and employees may obtain additional copies of these documents as well as additional information about the FMLA and their rights and obligations under that law from their supervisor, or by contacting ________________________ at (___) ________ [insert contact information for county attorney or some other knowledgeable person].

In addition to the FMLA, Tennessee has a leave law for adoption, pregnancy, childbirth and nursing an infant (T.C.A. § 4-21-408) which applies to all employers who employ 100 or more full-time employees at a job site or location. This state law allows employees who have been employed for twelve (12) months to take up to four (4) months of unpaid leave for adoption, pregnancy, childbirth and nursing the infant. To be eligible for this leave, the employee must give at least three (3) months advance notice, except in cases of medical emergency. This leave will run concurrently with any leave to which the employee may be entitled under the FMLA or otherwise. Subject to certain conditions, accrued paid leave may be substituted for the unpaid leave. Employees may obtain a copy of the Tennessee leave statute by contacting ________________________ at (___) ________ [insert contact information for county attorney or some other knowledgeable person].

Sample Policy - Bereavement/Funeral Leave

Reference Number: CTAS-1123

Sample Bereavement Leave Policy:

In the case of death in the employee’s immediate family, the employee will be given three (3) working days paid leave which will not be charged to vacation leave. Immediate family is defined as the employee’s spouse, parent, child, brother, sister, mother-in-law, father-in-law, grandparent, grandchild, legal guardian or legal dependent.
Sample Policy - Voting Leave

Reference Number: CTAS-1124

Sample Voting Leave Policy:

Any person entitled to vote in an election in this state may be absent from work for a reasonable period of time, not to exceed three hours, necessary to vote while the polls are open in the county where the employee resides. The employer may specify the time the employee may be absent. The employee will receive regular compensation during this period and leave time will not be affected. Voting time shall not be counted as working time for overtime computation.

Sample Policy - Jury and Court Duty

Reference Number: CTAS-1125

Sample Jury/Court Duty Policy:

The employer encourages all employees to fulfill their duty to serve as members of juries or to testify when called in both Federal and State courts. The following procedures shall apply when an employee is called for jury duty or subpoenaed to court:

1. The employee will be granted a leave of absence when the employee is subpoenaed or directed by proper authority to appear in Federal or State court as a juror or a witness.

2. The employee will receive his or her regular compensation for the time actually spent serving as a juror or witness and traveling to and from court.

3. The employee may retain all compensation or fees received for serving as a juror or as a witness.

4. If the employee serves as a witness or juror for more than three hours during the day, the employee will be excused from work for the entire day. Otherwise, the employee must report back to the employer at the conclusion of service.

5. The above provisions concerning compensation for time in court do not apply if the employee is involved as a party in private litigation. On these occasions the employee must take vacation leave, comp time or leave without pay.

Sample Policy - In Line of Duty Injury Leave (for counties covered by Workers’ Compensation)

Reference Number: CTAS-1126

Sample Workers’ Compensation Policy:

Any employee sustaining an injury or an illness during the course and scope of his or her employment which is determined to be compensable under the provisions of the Workers’ Compensation Law shall be entitled to receive in-line-of-duty injury leave. This leave shall not be counted against any accrued sick leave that the employee has accumulated. The employee is not permitted to substitute any other paid leave. Benefits that are receivable by the employee will be determined by the provisions of the Workers’ Compensation Law.

Sample Policy - In Line of Duty Injury Leave (for counties not covered by Workers’ Compensation)

Reference Number: CTAS-1127

Sample In-Line-of-Duty Injury Policy:

Notice of Injury - Every injured employee or his or her representative shall, immediately upon the occurrence of an injury, however minor, give or cause to be given to the employer
written notice of the injury. The employee shall not be entitled to benefits hereunder from
the date of the accident to the giving of such notice, unless it can be shown that the
employer had actual knowledge of the accident.

Injuries Not Covered - No benefits shall be allowed for an injury due to the employee’s
willful misconduct or intentional, self-inflicted injury, or due to intoxication, or
sports-related injury unless participation in sports activities is required by the job
description, or willful failure or refusal to use a safety appliance or perform a duty required
by law. This exclusion does not apply to mandatory physical fitness programs as developed
and mandated by the employer.

Period of Compensation - Injury leave shall extend for such time as the injured employee is
unable to return to work, but in no event beyond six months for the same or recurring
injury.

Compensation Received - During the period of time that the injured employee is on injury
leave, he or she will be entitled to receive full pay, subject to all other provisions and
qualifications set out herein. The employee will continue to earn vacation and sick leave.

Use of Sick Leave - An employee who is injured in the course of employment will be granted
injury leave, and such leave will not be charged against the employee’s sick leave nor may
an employee use sick leave for in-line-of-duty injuries.

Role of Employer’s Medical Examiner - The determination of character, degree and duration
of occupational disability is the responsibility of the Medical Examiner for the employer.
Employees will be required to return to work after the approval of the Employer’s Medical
Examiner, in consultation with the injured employee’s attending physician. If there are
conflicting opinions from the Employer’s Medical Examiner and the injured employee’s
attending physician, the final determination shall be left to the employer’s governing body.

Extended Injury Leave - Whenever an employee is on extended leave due to a work related
injury or illness, the employee must provide the employer with an update of the employee’s
medical condition every 30 calendar days. The employer has the right to instruct the
employee to be evaluated by the employer’s medical examiner. The employer shall be
responsible for placing the employee back to work as soon as he or she is physically capable
of resuming employment. If at any time it is medically indicated that the employee will not
be able to return to work prior to the expiration of six months, the employee, or the
employer on behalf of the employee, shall file an application for a disability pension.

Sample Policy - Administrative Leave with Pay

Reference Number: CTAS-1128
Sample Administrative Leave with Pay Policy:

Absence with pay for administrative purposes may be granted by the employer. Such leave
must be for a good cause as determined by the employer. This leave shall not exceed five
(5) working days per year unless exceptional circumstances exist.

Sample Policy - Administrative Leave without Pay

Reference Number: CTAS-1129
Sample Administrative Leave without Pay Policy:

Any employee, at the discretion of the employer, may be granted leave without pay for
sufficient reason as determined by the employer. During the period of absence, the
employee will not accrue vacation, sick leave or other benefits. The absence without pay
leave shall not extend for a period in excess of one year.

Sample Policy - Military Leave

Reference Number: CTAS-1130
Sample Military Leave Policy:

Regular employees who are members of any military reserve component, including the
Tennessee army and the air national guard, will be granted a leave of absence for all periods of military service during which they are engaged in the performance of duty or training for this state or for the United States under competent orders. While on leave, the employee will receive his or her regular compensation for a period not exceeding twenty (20) working days per calendar year, plus any additional days that may result from a call to active state duty by the Governor. Such requested leave shall be supported with copies of the armed forces orders.

Regular employees will be granted a leave of absence without pay for the purpose of being inducted into or otherwise entering military duty. If not accepted, the employee will be reinstated at the same rate of pay and without loss of seniority, benefits or status. If accepted for service, the employee may be eligible for reinstatement upon being released from active duty upon meeting the conditions set out in T.C.A. Title 8, Chapter 33, relative to employees in military service, and in accordance with the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301 - 4333.

Employees in military service shall be governed by the requirements of, and shall have all of the rights and benefits conferred upon such persons by state law found in T.C.A. Title 8, Chapter 33, and under USERRA.

Sample Wage and Hour Policies

Reference Number: CTAS-1131
All county offices are required to have written wage and hour policies in place. Following are some sample policies that may be used to comply with the law.

Sample Policy - Workweek

Reference Number: CTAS-1132
Sample Policy Defining the Workweek:

The workweek for employees of _________ County begins at 12:01 a.m. on Sunday and ends at 12:00 midnight on Saturday each week. The regular workweek for _________ County employees is _________ (__) hours. Employees who are paid on an hourly basis will receive compensation at their regular rate of pay for all hours worked up to and including 40 in the workweek. The salary paid to salaried employees is compensation for all hours worked by such employees up to and including 40 in the workweek. The actual work schedule for each employee will be arranged by that employee’s supervisor.

Sample Policy - Overtime

Reference Number: CTAS-1133
Sample Overtime Policy:

"Overtime” is defined as time worked in excess of 40 hours in a workweek. Non-exempt employees, as defined herein, who work over 40 hours in a workweek are entitled to compensation for such hours, either in cash at the rate of one and one-half times their regular rate of pay, or (with a prior agreement or understanding between the employer and employee) compensatory time off at the rate of one and one-half hour for each hour of overtime worked. Employees shall not work overtime without first receiving the approval of their supervisor. Any employee who works overtime without obtaining advance approval of the supervisor as required may be subject to disciplinary action, up to and including termination of employment.

Sample Policy - Compensatory Time

Reference Number: CTAS-1134
Sample Compensatory Time Policy:

Compensatory time may be given to those employees who work overtime as provided in the section on "Overtime” and with whom the county has a prior agreement or understanding that the employee will accept compensatory time in lieu of cash payment for overtime. Employees are encouraged to use their accrued compensatory time, and the county will
make every effort to grant reasonable requests for the use of compensatory time when sufficient advance notice is given and the workplace is not unduly disrupted. The maximum number of compensatory time hours that an employee may accrue is _________. Any employee who has reached this maximum shall not work any additional overtime until the employee’s accrued compensatory time has fallen below the maximum allowed, unless the employee receives advance written authorization and receives payment in cash for any such additional overtime. The county reserves the right at any time to pay an employee in cash for any or all accrued compensatory time and/or to require the employee to use accumulated compensatory time.

Compensatory Time Agreement

The federal wage and hour laws require a prior agreement or understanding before compensatory time may be given to employees in lieu of cash payment for overtime. This can be accomplished through the county’s policies, but some counties may wish to have a signed agreement with employees who receive compensatory time. The following is an example of a compensatory time agreement, although there are other acceptable methods of evidencing an agreement. The employer should give one copy to the employee and place the other copy in the employee’s personnel file.

SAMPLE COMPENSATORY TIME AGREEMENT

In accordance with the Fair Labor Standards Act, ________ County has a policy of granting employees compensatory time off in lieu of compensation for time worked in excess of 40 hours in a workweek (or other permissible schedules for law enforcement, firefighters, and certain other employees). A copy of this policy is on file in the office of the County Clerk. I understand that compensatory time will be granted at time and one half for all time worked in excess of 40 hours (or other permissible work schedules). I further understand that accrued compensatory time may be used in accordance with county policy and the applicable laws, rules and regulations of the U. S. Department of Labor. I voluntarily and knowingly agree to accept compensatory time off in lieu of cash compensation for overtime work and to the use of accrued compensatory time off in accordance with the county’s policy and the laws, rules and regulations of the U. S. Department of Labor.

____________________________________
Employee signature

____________________________________
Date

Sample Policy - Time Records

Reference Number: CTAS-2079
Sample Time Records Policies:

Time Records - Example 1

Employees are required to record their hours worked on the forms provided for this purpose. Both exempt and non-exempt employees are required to fill in this form daily and, at the end of the workweek, sign and forward them to the supervisor for review and processing. Employees must ensure that the actual hours worked and leave time taken are recorded accurately. Falsifying these records is a crime under T.C.A. § 39-16-504.

Time Records - Example 2

Employees shall work a set schedule Monday through Friday, from 8:00 a.m. until 4:30 p.m., with one-half hour during which the employee is totally relieved of all duties for lunch. Each employee shall sign a schedule showing that particular employee’s work schedule. For any day the employee varies from the established work schedule, the employee is required to file with the supervisor a signed schedule variance form, which shall show the exact hours worked during the work day, and shall show sick leave, holiday leave, and vacation time taken. Employees must ensure that their actual hours worked and leave time taken are recorded accurately. Falsifying these records is a crime under T.C.A. § 39-16-504.
Sample Non-Discrimination and Harassment Policies

Reference Number: CTAS-1135

Counties are required to have written non-discrimination and harassment policies. Following are examples of policies that you may use as guides.

Sample Policy - Equal Employment Opportunity

Reference Number: CTAS-1136
Sample EEO Policy:

*It is the policy of ________ County to provide equal employment opportunities to all individuals regardless of race, color, religion, sex, sexual orientation, gender identity, national origin, age, disability, status as a Vietnam-era veteran or special disabled veteran, or status in any other group protected by law. This policy extends to all terms and conditions of employment, including but not limited to hiring, placement, promotion, termination, layoff, recall, transfer, leaves of absence, compensation and training. It is the policy of ________ County to make reasonable accommodations for qualified individuals with known disabilities unless doing so would result in undue hardship.*

*It is the policy of ________ County to maintain a respectful work and public service environment. ________ County prohibits and will not tolerate any form of unlawful harassment by or toward any employee or official on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, age, disability, status as a Vietnam-era veteran or special disabled veteran, or status in any other group protected by law. Any employee or official who engages in such behavior is subject to disciplinary action, up to and including termination of employment.*

*Employees or applicants with questions or concerns about any type of discrimination or harassment in the workplace are encouraged to bring these issues to the attention of the immediate supervisor or department head. Employees can raise concerns and make complaints without fear of reprisal and with the assurance of protection from harassment or retaliation. Anyone found to be engaging in discrimination or harassment in violation of county policy will be subject to disciplinary action, up to and including termination of employment. A finding of a violation of county policy does not, however, amount to a finding of unlawful discrimination or harassment; in order to further its objective of equal employment opportunities the county may, but shall not be required to, interpret its policy more broadly than federal or state law mandates.*

Sample Policy - Hiring Practices

Reference Number: CTAS-1137
Sample Hiring Policy:

*___________ County does not discriminate in its hiring practices on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, age, disability, status as a Vietnam-era veteran or special disabled veteran, or status in any other group protected by law. In order to give all interested parties an opportunity to apply for positions as they become open, job openings will be posted in the courthouse on the main bulletin board. All qualified applicants are urged to apply. Applicants must apply for a specific job opening. Employment applications will not be accepted unless a specific position is open at the time the application is submitted. Applications are not retained after the position for which the application was submitted has been filled. Anyone applying for a subsequent opening must submit a new application.*

Sample Policy - Discrimination/Harassment Complaint Procedure

Reference Number: CTAS-1138
Sample Complaint Procedure Policy:
Discrimination, including harassment, in the workplace on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, age, disability, genetic information, veteran status, or status in any other group protected by law is illegal. If an employee believes that he or she has been subjected to illegal discrimination or harassment related to employment with _______ County, the employee should report the incident promptly to the county official or department head under whose direction the employee works. If the problem is not resolved within a reasonable time, or if for any reason the employee feels uncomfortable reporting the problem to the county official or department head, then the problem should be reported to the county _______. The county _______ may act as a mediator between the affected employee and the county official or department head under whose direction the employee works to assist them in reaching an acceptable resolution of the problem, but the county _______ has no legal authorization to make employment decisions on behalf of the county official or department head. A conclusion by the county that disciplinary action should be taken does not constitute a finding of unlawful discrimination or harassment; in order to further its objective of equal employment opportunities the county may, but shall not be required to, interpret its policy more broadly than federal or state law mandates. No adverse personnel action will be taken against an employee for reporting an incident of discrimination or harassment or for assisting in the investigation of a complaint. However, disciplinary action may be taken against an individual who intentionally and maliciously provides false information in connection with a complaint.

Sample Policy - Religious Accommodation

Reference Number: CTAS-1139

Sample Religious Accommodation Policy:

Efforts will be made to accommodate the religious observance and practices of an employee unless such accommodation is unreasonable and would result in an undue hardship on the conduct of business. In making these decisions, supervisors will consider such factors as business necessity, financial costs and expenses, and resulting personnel problems.

Sample Policy - Disability Accommodation

Reference Number: CTAS-1140

Sample Disability Accommodation Policy:

It is the policy of [name of county] to assure equal employment opportunity to persons with disabilities on the basis of qualifications and ability to perform the job. There shall be no discrimination in terms of employment opportunities, wages, hours of work, or other terms or conditions of employment or benefits.

An individual with a disability is one who has a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or who is regarded as having such an impairment.

Application Process

Persons with disabilities are guaranteed the same application process as other applicants. Assistance may be provided when needed, such as the following:

(a) A reader may be provided for completing an application or written examination for qualified applicants who are vision-impaired or functionally illiterate.

(b) Waiver of a driver’s license may be requested for qualified disabled applicants who are not allowed to drive.

Employment Physical

New employees working in ___________ positions are required to take a physical examination after an offer of employment has been made. The physical examination will be conducted at the [name of county] Health Department at county expense. If a physical limitation is determined which prevents an otherwise qualified individual from performing the essential functions of the job, the appointee can still retain the
position if reasonable accommodation can be made. The possibility of reasonable accommodation shall be determined by the applicant and the employer. Information obtained in the pre-employment physical shall be confidential to the extent provided by law, except for the following:

(a) Supervisors shall be informed of any restrictions on the duties required for reasonable accommodation.

(b) Safety personnel shall be informed of any possibility of emergency treatment.

Reasonable Accommodation

A department shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with disabilities. The specific accommodations needed shall be determined jointly by the individual and the employer with technical assistance provided by the ADA Coordinator for [name of county]. Reasonable accommodation may include, but shall not be limited to:

(a) making facilities readily accessible to and usable by persons with disabilities, and

(b) job restructuring, job sharing or modified work schedule, acquisition or modification of equipment or devices and other similar actions.

In determining whether an accommodation would impose an undue hardship on the operation of the department, factors to be considered include:

(a) the overall size of the specific work area or program with respect to the number of employees and budget,

(b) the type of operation, and

(c) the nature and cost of the accommodation needed.

It is the responsibility of the employee or applicant to make known to the employer the need for an accommodation.

Accessibility

Each department is required periodically to survey its programs and physical facilities to determine if they are accessible to persons with disabilities. If structural problems are found, it is the responsibility of [name of county] to budget for changes. Non-structural problems requiring some form of reasonable accommodation will be addressed on an individual basis. The ADA Coordinator will provide technical assistance in areas of accessibility related to employment.

Complaints

Individuals who believe that they have been subjected to discrimination on the basis of a disability are encouraged to report the incident in accordance with the complaint procedure included with the county’s policy on Equal Employment Opportunity, or discuss the matter with the county’s ADA Coordinator, ______________, or both.

Sample Policy - Sexual Harassment

Reference Number: CTAS-1141

Sexual harassment, when it was first recognized, was treated somewhat differently than other forms of workplace harassment. As the law has developed over the years, this form of harassment is being treated essentially the same as the other forms of harassment and a separate policy is not necessary. However, counties may wish to adopt a separate policy addressing this issue. Following is an example of such a policy:

One particular kind of harassing behavior is sexual harassment. Sexual harassment, which can consist of a wide range of unwanted and unwelcome sexually directed behavior, is defined as:

Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when:

(1) Submitting to the conduct is made either explicitly or implicitly a term or
condition of an individual’s employment or of obtaining public services; OR

(2) Submitting to or rejecting the conduct is used as the basis for an employment decision affecting an individual’s employment or public services; OR

(3) Such conduct has the purpose or result of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.

Neither sexual harassment nor any other form of unlawful harassment will be tolerated in the workplace. Employees are urged to report alleged incidents of unlawful harassment. No adverse personnel action will be taken against any employee who reports such incidents or who assists in an investigation of a complaint. Anyone found to be engaging in harassment in violation of county policy will be subject to disciplinary action, up to and including termination of employment. A finding of a violation of county policy does not, however, amount to a finding of unlawful harassment; in order to further its objective of equal employment opportunities the county may, but shall not be required to, interpret its policy more broadly than federal or state law mandates.

Sample Drug-Free Workplace and Drug Testing Policies

Reference Number: CTAS-1142

The Drug Free Workplace Act of 1988 requires local governments who receive federal grant funds to maintain a drug-free workplace. This does not, however, require drug testing. Following is a sample drug-free workplace policy.

**Drug-Free Workplace Policy**

__________ County is committed to providing a safe work environment and to fostering the well-being and health of its employees. This commitment is jeopardized when any county employee illegally uses drugs on the job, comes to work under their influence, or possesses, distributes or sells drugs in the workplace. Therefore, _________ County has established the following policy:

1. It is a violation of _________ County policy for any employee to possess, sell, trade, or offer for sale illegal drugs or otherwise engage in the illegal use of drugs on the job.

2. It is a violation of _________ County policy for anyone to report to work under the influence of illegal drugs.

3. It is a violation of _________ County policy for anyone to use prescription drugs illegally. (However, nothing in this policy precludes the appropriate use of legally prescribed medications.)

4. Violations of this policy are subject to disciplinary action up to and including termination.

5. As a condition of employment with __________ County, employees must abide by the terms of this policy and must notify __________ County in writing of any conviction of a violation of a criminal drug statute occurring in the workplace no later than five (5) calendar days after such conviction.

It is the responsibility of county employees’ supervisors to counsel employees whenever they see changes in performance or behavior that suggest that an employee has a drug problem. Although it is not the supervisor’s job to diagnose personal problems, the supervisor should encourage such employees to seek help and advise them about available resources for getting help. Everyone shares responsibility for maintaining a safe work environment and co-workers should encourage anyone who may have a drug problem to seek help.

Employees needing treatment information should call [name of local employee assistance program, employer’s employee assistance program director, a qualified physician, etc.]

The goal of this policy is to balance our respect for individuals with the need to maintain a safe, productive and drug-free environment. The intent of this policy is to offer a helping
hand to those who need it, while sending a clear message that the illegal use of drugs is incompatible with employment at ________ County.

**Drug Testing Programs.** CTAS does not provide sample drug testing policies, but instead recommends that counties contract with a reputable expert to handle the program, including the development of the drug testing policies (Sample Drug Testing Program Request for Proposal). It is essential that the policy accurately reflect the testing program as it is carried out in the county. For more information on Drug Testing programs, see Drug and Alcohol Testing.

### Sample Forms and Acknowledgments

Reference Number: CTAS-1143

Employers often include provisions in their personnel manuals advising employees that policies may be changed at any time, as well as a form for the employee to sign acknowledging receipt of the policies. Following are samples of these provisions:

**Amendment of Policies**

> It is the responsibility of all employees to carry out and comply with the rules and regulations contained in this manual. The employee should be aware that these rules and regulations are subject to periodic review and change by the employer. Before relying upon the provisions set out herein, it is the employee’s responsibility to check with the employer to see if any changes have occurred.

**Sample Employee Acknowledgment Form - Receipt of Policies**

**EMPLOYEE ACKNOWLEDGMENT [two copies — give one to the employee and place the other copy in the employee’s personnel file]**

By signing this form, I acknowledge that I have received a copy of the personnel policies currently in effect for my office as of this date, and I understand that it is my responsibility to read and comply with the policies.

These policies cannot and are not intended to answer every question about my employment with __________ County. I understand that I should consult [county official] regarding any part of the policies that I do not understand or any questions I may have about my employment with __________ County that are not answered in the policies. The current policies will always be on file in the office of the County Clerk, and I may examine them there at any time during normal business hours.

The policies are necessarily subject to change, and I acknowledge that revisions may occur from time to time. I understand that all changes to the policies will be filed in the office of the County Clerk. Although my employer will usually provide me with notice of changes, I understand that changes will apply to me regardless of whether I receive actual notice. I understand that revised information may supercede, modify or eliminate any or all of the policies at any time. All information contained in the policies is subject to applicable state and federal laws, rules and regulations, and I understand that to the extent that any such laws may conflict with any provision of the policies, such laws, rules and regulations will control.

I have entered into my employment relationship with __________ County voluntarily, and I acknowledge that there is no specific length of employment and that my employment may be terminated by me or by my employer at will, without cause or prior notice, at any time.

I acknowledge that none of the __________ County’s policies may be construed to create a contract of employment or any other legal obligation, express or implied, and that any policy may be amended, revised, supplemented, rescinded or otherwise altered, in whole or in part, at any time, in the sole and absolute discretion of __________ County.

_____________________________

Employee Name (type or print)

_____________________________ ________________

Employee Signature Date
Notice Regarding Falsification of Governmental Records. A copy of Tennessee Code Annotated § 39-16-504 is required to be furnished to all employees under T.C.A. § 5-23-107, and should be included in all personnel manuals. The statutory language is as follows:

T.C.A. § 39-16-504. Government record; destruction, tampering or fabrication.

(a) It is unlawful for any person to:

1. Knowingly make a false entry in, or false alteration of, a governmental record;
2. Make, present, or use any record, document or thing with knowledge of its falsity and with intent that it will be taken as a genuine governmental record; or
3. Intentionally and unlawfully destroy, conceal, remove or otherwise impair the verity, legibility or availability of a governmental record.

(b) A violation of this section is a Class E felony.

Employee Leave

Reference Number: CTAS-177

Giving employees time off from work is sometimes mandated by state or federal law, and sometimes it is simply good management practice. The following pages review the common types of leave as well as the various laws that affect employee leave in counties. It is important to understand what leave is required by law and what is left to the discretion of the employer. State law requires that counties have written policies in place setting out their practices with regard to employee leave.[1]

Personnel Policies including sample policies
Sample Leave Request Form


Holidays

Reference Number: CTAS-178

By state statute, T.C.A. § 15-1-101, the General Assembly has established certain days as legal holidays in Tennessee:

January 1; the third Monday in January, "Martin Luther King, Jr. Day"; the third Monday in February, known as "Washington Day"; the last Monday in May, known as "Memorial" or "Decoration Day"; June 19, known as "Juneteenth"; July 4; the first Monday in September, known as "Labor Day"; the second Monday in October, known as "Columbus Day"; November 11, known as "Veterans’ Day"; the fourth Thursday in November, known as "Thanksgiving Day"; December 25; and Good Friday; and when any one (1) of these days falls on Sunday then the following Monday shall be substituted; and when any of these days falls on Saturday then the preceding Friday shall be substituted; also, all days appointed by the governor or by the president of the United States, as days of fasting or thanksgiving, and all days set apart by law for holding county, state, or national elections, throughout this state, are made legal holidays, and the period from noon to midnight of each Saturday which is not a holiday is made a half-holiday, on which holidays and half-holidays all public offices of this state may be closed and business of every character, at the option of the parties in interest of the same, may be suspended.[1]

The Tennessee Attorney General has opined that the only days that county offices are authorized to close are those listed in the statute.[2] Closing county offices on days other than legal holidays can result in serious consequences. For example, in the case of Wright v. Blalock,[3] a clerk of court closed the clerk’s office on the day after Thanksgiving, which is not a legal holiday, and a
litigant was unable to file a notice of appeal that was due on that date, and the court refused to extend the time for filing the notice of appeal.

The Attorney General has opined that which of the listed legal holidays a particular county observes is to be determined under policies adopted pursuant to the County Personnel Law, codified at T.C.A. § 5-23-101 et seq. The policies should state which days will be observed as holidays for each county office, what happens if a holiday falls on a weekend, and any special pay and/or time off provisions the employer may want to adopt for employees who are required to work on a holiday.

The observance of religious holidays can trigger a duty to accommodate employees who do not celebrate these occasions or who celebrate other religious holidays. Reasonable accommodations should be made when possible for those employees who observe other religious holidays. Whether reasonable accommodations can be made often depends upon the hardship created on the conduct of the employer's business. For more on religious accommodation, see Religious Discrimination.

Veteran’s Day

Pursuant to T.C.A. § 15-1-105, an employer is required to allow veteran employees to have the entirety of November 11, Veterans' Day, as a non-paid holiday if: (1) the veteran employee provides the employer with at least one-month’s written notice of the veteran employee’s intent to have the entirety of that day as a non-paid holiday; (2) the veteran employee provides the employer with proof of veteran status, which may include, but is not limited to, a DD Form 214 or other comparable certificate of discharge from the armed forces; and (3) the veteran employee’s absence, either alone or in combination with other veteran employee’s absences, on that day will not impact public health or safety, or cause the employer significant economic or operational disruption as determined by the employer in the employer’s sole discretion.

This law does not prohibit an employer from allowing the employer's veteran employees to have the entirety of Veterans Day as a paid holiday. T.C.A. § 15-1-105.


Vacation/Annual Leave

Reference Number: CTAS-1003

Because employees generally are more productive and happier if they periodically are given time off from work, employers usually provide a specific number of vacation days per year for each employee, which is sometimes called annual leave. Employers are not required by law to give employees paid vacations, but state law does require that county government employers have a written policy stating whether paid vacation leave is given and if so, how it accumulates and how it may be used, whether employees will be paid for unused vacation days, and provisions for maintaining records.¹

[¹] T.C.A. § 5-23-104.

Sick Leave
Reference Number: CTAS-1004
The law does not mandate paid sick leave for most county employees,[1] although a certain amount of unpaid leave may be required under the federal Family and Medical Leave Act (FMLA) for illness that meets the definition of a “serious health condition.” More on FMLA

Since employers generally are not required by law to give employees paid sick leave, an employer may establish any paid sick leave policy that suits the employer’s needs. However, state law requires that county government employers have a written policy stating whether paid sick leave is given and if so, how it accrues and how it may be used, and provisions for maintaining leave records.[2]  

[1] Paid sick leave for teachers is required and is regulated under T.C.A. § 49-5-710. Also, employees who are injured on the job receive leave with a portion of their regular pay under the state Workers’ Compensation Law, discussed elsewhere in this manual.


Bereavement/Funeral Leave
Reference Number: CTAS-1005
Employers are not required by law to provide bereavement leave, but many employers choose to allow an employee paid time off for the death of a family member. If the employer offers this kind of leave, a written policy is required under T.C.A. § 5-23-104. The policy should state whether this leave is paid or unpaid leave, set out a specific number of allowable days, and define the family members to which it applies.

Voting Leave
Reference Number: CTAS-1006
Under state law found at T.C.A. § 2-1-106, any person who is entitled to vote in an election held in Tennessee is entitled to take a reasonable amount of time off from work, up to three (3) hours, in order to vote during the time the polls are open in the county where the employee is a resident. The employer may specify the hours during which the employee may be absent, and the employee is required to apply for voting leave to the employer before noon of the day before the election. The state law further provides that the employee cannot be penalized or suffer a reduction in pay due to the absence. There is an exception to this requirement—if the employee’s work period begins three or more hours after the opening of the polls or ends three or more hours before the closing of the polls, then the employer is not required to allow any time off from work.

Jury and Court Duty
Reference Number: CTAS-1007
State law requires that employees be excused from work when they are summoned for jury service. Upon receiving a summons to report for jury duty, an employee must present the summons to the supervisor on the next day he or she works. The employee must be excused from work for the entire day or days the employee is required to serve as a juror, except the employee can be required to return to work on days when the employee is required to serve less than three (3) hours. The employee is entitled to his or her usual compensation, less the amount of fee or compensation received for serving as a juror (or the employer may choose to pay the employee the usual compensation without deducting the juror fee). The employer is not required to compensate an employee for more time than was actually spent serving and traveling to and from jury duty. These provisions do not apply to any employee who has been employed on a temporary basis less than six (6) months, and special rules apply to night-shift employees. T.C.A. § 22-4-106.

Employees may not be discharged, demoted or suspended for taking time off for jury service when they have given the required notice. T.C.A. § 22-4-106. Federal law also prohibits the discharge of an employee for performing jury service in federal court. 28 U.S.C. § 1875.
Employees also may be subpoenaed to testify in court. Although no state law establishes specific requirements, public policy dictates that employees be given time off in order to comply with a validly issued subpoena to appear in court. Employers are not required to compensate employees for appearing in court as a party or as a witness.

As with all other forms of leave, policies covering these areas must be set out in writing under T.C.A. § 5-23-104.

Pregnancy Leave and other Parental Leave

Reference Number: CTAS-1008

The federal Pregnancy Discrimination Act (PDA), an amendment to the Civil Rights Act of 1964, prohibits employment discrimination against women on the basis of pregnancy, childbirth or related medical conditions. This means that pregnancy-related conditions must be treated the same as any other temporary medical incapacity. The PDA applies to employers who have 15 or more employees. For this purpose the county generally is treated as the employer (not the individual office). The term “employees” includes local government employees, but does not include elected officials and their personal staff or policy-making appointees.

If the employer grants paid sick leave for temporary medical disabilities, female employees must receive the same benefit for pregnancy-related medical conditions. In other words, the employee must not be required to take unpaid leave during the time that she is medically unable to work due to pregnancy and childbirth if paid leave is available for other medical conditions. The employer must provide leave for pregnancy-related conditions in the same manner as all other reasons for leave under the employer’s policies. For example, if other employees are allowed only two weeks paid sick leave, but may take unpaid leave for other purposes, a pregnant employee who is unable to work must be allowed to take the two weeks paid sick leave together with the amount of unpaid leave allowed other employees. Female employees cannot be penalized for taking maternity leave if other employees are not penalized for taking similar leaves of absence. For example, if retirement or seniority rights continue to accrue while an employee is on vacation or sick leave, those rights must continue to accrue during maternity leave. Pregnant employees are entitled to the same benefits (paid leave, health insurance, temporary disability payments, temporary work reassignment, etc.) as are provided for other temporary medical disabilities. However, if the employer does not provide a particular benefit for other temporary medical incapacities, that benefit is not required for pregnant employees. Finally, an employer may not set mandatory leave dates for pregnant employees. An employee must be allowed to continue to work as long as she is able to perform her job.

Eligible male and female employees are entitled to leave for the birth of a child, or for the adoption or placement of a child for foster care, under the federal Family and Medical Leave Act. See Leave for Birth, Adoption and Foster Care under Family and Medical Leave Act (FMLA) for more information. In addition to federal law, Tennessee has enacted a parental leave law, found at T.C.A. § 4-21-408, which applies to all employers who employ 100 or more full-time employees at a job site or location (generally the county would be treated as the employer, not the individual office). The state law allows up to four months off for adoption, pregnancy, childbirth and nursing an infant for both male and female employees who have been employed for 12 months. The leave may be with or without pay. The Tennessee Attorney General has opined that this state law does not conflict with the federal Pregnancy Discrimination Act. The statute requires that the provisions of the Tennessee parental leave law be included in the next employee handbook published by the employer after May 27, 2005.


Administrative Leave with Pay

Reference Number: CTAS-1009
Sometimes an emergency will arise that requires an employee to miss work. When this occurs, the employee may not have any accumulated vacation time or comp time to use to cover the absence. Most employers do not mind allowing the employee some extra time to cope with these emergencies. To cover these occurrences, the employer can adopt a written policy that allows the employer to grant additional leave with pay to an employee. This leave should be called administrative leave since it is granted at the discretion of the employer. Some maximum amount of leave should be set for this type of leave, if it is used.

**Administrative Leave without Pay**

Reference Number: CTAS-1010

Circumstances can arise when an employee needs to take time off work but has no available paid leave time, and the employer may want to allow the employee to miss work but the employer does not want to grant paid leave during the absence. In these instances, the employer may want to adopt a policy providing for administrative leave without pay. During leave without pay, the employee normally would not accrue sick leave, vacation or other benefits. A limit should be placed on the length of time that an employee could be absent from work under this type of leave. This type of leave is not required by law. If it is used, however, it should be granted in a non-discriminatory manner.

**Leave After an Arrest**

Reference Number: CTAS-2478

Under T.C.A. § 7-51-1701, if a county has or implements a personnel policy that places an employee on leave immediately following an arrest of the employee, the county is required to implement a policy that restores back pay to the employee if the charges are dropped or an employee is found not guilty of the charges. This requirement does not apply if the employee pleads guilty; separates from employment voluntarily before the employee is found guilty; or is terminated for a reason other than the arrest.

**In Line of Duty Injury Leave**

Reference Number: CTAS-1011

In private industry, on-the-job injuries are governed by the Workers’ Compensation Law found at T.C.A. § 50-6-101 et seq. The application of this law is mandatory in the private sector. In the public sector, pursuant to T.C.A. § 50-6-106, the General Assembly has allowed counties and municipal corporations to elect whether they want to be covered by the Workers’ Compensation Law. The county should have a resolution of the county legislative body and a policy in place stating whether the employer has elected to come under the Workers’ Compensation Law, and if not, how leave for these injuries is handled. If the county has elected not to be covered by the Workers’ Compensation Law, then the leave policies will need to include more extensive provisions concerning leave for in-line-of-duty injury. The policy needs to address such areas as notice of the injury, injuries not covered, compensation and extended injury leave provisions.

Workers’ compensation issues are complex and the county employer should seek the advice of competent legal counsel and risk management experts in determining its policies and procedures with regard to this topic.

**Leave for Arrested Employees**

Reference Number: CTAS-1012

If a county has a policy that places an employee on leave for any period of time following an arrest of the employee, the county’s policy must include a provision requiring restoration of back pay to the employee if the charges are dropped or the employee is found not guilty of the charges. This requirement does not apply if the employee pleads guilty to the charges or enters into a plea agreement on the charges.[1]

Military Leave

Reference Number: CTAS-1013

County officers and employees who are called to active military duty are entitled to military leave and to re-employment and restoration of benefits under both state and federal law upon their return from active duty. County employers must provide the benefits mandated by these statutory provisions to returning employees. The rights and benefits provided for in the two statutes are similar but not identical.

Following is a summary of the provisions of the state and federal laws:

- Employment discrimination because of past, current or future military service is prohibited.
- Employers are required to grant employees a leave of absence for the period necessary to perform military service. Employees cannot be required to use accrued leave or vacation time, but if the employee requests annual leave or paid vacation the employer must allow it.
- Employees returning from military service are entitled to restoration of employment with seniority, status and pay rate as if continuously employed.
- Employees on leave of absence for military service do not continue to accumulate vacation or sick leave. However, if the employer allows accrual of vacation or sick leave for employees who are on furlough or leave of absence, then an employee who is absent for military service is entitled to the same benefit.
- Employees on military leave are entitled to elect to continue their health insurance for up to 18 months and may be required to pay the employee’s share of the premium. And, an employee may be required to pay the employee cost of any other continued funded benefit to the extent other employees on furlough or leave of absence are required to do so.
- State law grants paid military leave, for up to 20 working days in any one calendar year, to county officers and employees while they are performing military service. After the 20 working days of full compensation, any public employer may, but is not required to, provide partial compensation to its employees while under competent orders.

Federal Law-USERRA

Reference Number: CTAS-1014

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301 - 4333, protects the rights and benefits of employees who are absent from work because of service in the armed forces. This federal law prohibits employment discrimination because of past, current, or future military obligations, which includes hiring, promotion, reemployment, termination, and benefits.\[1\] USERRA does not apply to the state call-up of National Guardsmen.\[2\] State call-up of National Guardsmen is addressed by state law.\[3\]

Under USERRA, re-employment rights extend to persons who have been absent from a position of employment because of "service in the uniformed services." USERRA applies to persons who perform duty, voluntarily or involuntarily, in the "uniformed services."\[4\] The "uniformed services" include the Army National Guard and Air National Guard, in addition to the Army, Navy, Marine Corps, Air Force, Coast Guard, and the reserve components of each of these services.\[5\]

Any person whose absence from a position of employment is necessitated by service in the uniformed services is entitled to USERRA reemployment rights and benefits if:

- The person gave notice to the employer that he or she was leaving the job for service in the uniformed services, unless giving notice was precluded by military necessity or otherwise impossible or unreasonable;\[6\]
- The period of service did not exceed five years;\[7\]
- The person reported back to the civilian job in a timely manner or submitted a

\[1\] USERRA does not apply to the state call-up of National Guardsmen.

\[2\] State call-up of National Guardsmen is addressed by state law.

\[3\] USERRA does not apply to the state call-up of National Guardsmen.

\[4\] The "uniformed services" include the Army National Guard and Air National Guard, in addition to the Army, Navy, Marine Corps, Air Force, Coast Guard, and the reserve components of each of these services.

\[5\] Any person whose absence from a position of employment is necessitated by service in the uniformed services is entitled to USERRA reemployment rights and benefits if:

- The person gave notice to the employer that he or she was leaving the job for service in the uniformed services, unless giving notice was precluded by military necessity or otherwise impossible or unreasonable;
- The period of service did not exceed five years;
- The person reported back to the civilian job in a timely manner or submitted a
timely application for re-employment; and

- The person was not released from service under dishonorable or other punitive conditions.

The employee returning from service must notify the employer of his or her intent to return to work within a specific time period that depends on the length of time the employee was in service. These time periods are:

Less than 31 days of service: The employee must report to the employer by not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person’s residence; or as soon as possible after the expiration of the eight-hour period referred to above, if reporting within the period referred to above is impossible or unreasonable through no fault of the person.

31 to 180 days of service: The employee must submit an application for re-employment with the employer not later than 14 days after the completion of the period of service or if submitting the application within that time period is impossible or unreasonable through no fault of the employee, the next first full calendar day when submission of such application becomes possible.

181 days or more: The employee must submit an application for re-employment with the employer not later than 90 days after the completion of the period of service.

With a service-connected injury or illness: Reporting or application deadlines are extended for up to two years for persons who are hospitalized or convalescing.

Under USERRA, the position into which a returning employee is reinstated is also based on the length of military service. These rules are:

Less than 91 days of service: The employee must be re-employed and placed in the position in which the person would have been employed if continuous employment had not been interrupted by such service, and which the person is qualified to perform; or, if the person is not qualified to perform the duties of the position after reasonable efforts by the employer to qualify the person, the employee must be re-employed in the position in which the person was employed on the date of the commencement of the service in the uniformed services.

91 days of service or more: The employee must be re-employed in the position in which the person would have been employed if continuous employment had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or, if the person is not qualified to perform the duties of former position after reasonable efforts by the employer to qualify the person, the employee must be re-employed in the position which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform.

Service-related disability: If a person has a disability incurred in, or aggravated during, military service, and after reasonable efforts by the employer to accommodate the disability, is not qualified because of the disability for the position in which the person would have been employed if employment had not been interrupted by military service, the person must be placed in another position which is equivalent in seniority, status and pay, the duties for which the person is qualified or would become qualified with reasonable efforts by the employer, or the person must be placed in a position which is the nearest approximation to such a position in terms of seniority, status, and pay consistent with circumstances of the person's case.

A re-employed employee is entitled to seniority and other rights and benefits that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits the person would have attained if the person had remained
continuously employed. A re-employed employee cannot be discharged, except for cause, within one year after the date of re-employment, if the person’s period of service before the re-employment was more than 180 days; or within 180 days after re-employment if the person’s period of service before the re-employment was more than 30 days but less than 181 days.

Under USERRA, an employee who is absent from employment due to service in the uniformed services is deemed to be on furlough or leave of absence while performing such service and is entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service. However, an employee deemed to be on furlough or leave of absence under USERRA is not entitled to any benefits to which the person would not otherwise be entitled if the person had remained continuously employed. And, the employee may be required to pay the employee cost, if any, of any continued funded benefit to the extent other employees on furlough or leave of absence are so required.

An employee who is performing military service is permitted, upon request, to use any accrued vacation, annual, or similar leave with pay, but the employer cannot require an employee to use vacation, annual, or similar leave. Like the state statute, USERRA does not provide for the accumulation of vacation or sick leave while a covered employee is on military leave. However, if the employer allows accrual of vacation or sick leave for employees who are on furlough or leave of absence, then an employee having similar seniority, status, and pay who is absent for military service is entitled to the same benefit.

USERRA also provides for the continuation of health insurance benefits. An employee who is performing military service may elect to continue such coverage. The maximum period of coverage of a person and the person’s dependents under such an election is 18 months. An employee who elects to continue health-plan coverage may be required to pay not more than 102 percent of the full premium under the plan. However, if the employee’s military service is less than 31 days, that person cannot be required to pay more than the employee share, if any, for such coverage. USERRA also protects pension plan benefits that accrued during military service.

A non-technical resource guide to USERRA may be downloaded from the Department of Labor. Additional assistance is available from ESGR (Employer Support of the Guard and Reserve). Part of ESGR’s mission is to assist in preventing, resolving, or reducing employer and/or employee problems and misunderstandings that result from National Guard or Reserve membership, training, or duty requirements through information services and informal mediation. To contact an ESGR representative call (615) 313-0657 or access the ESGR website.

[2] Although USERRA applies to National Guard duty assignments under federal authority, it does not apply to National Guardsmen called to duty under state authority, such as disaster relief or riot control.
State Law

Reference Number: CTAS-1015

In addition to the federal law, state law found at T.C.A. § 8-33-101 et seq. provides protections for employees in military service. Pursuant to T.C.A. § 8-33-109, all county officers and employees who are, or may become, members of any reserve component of the armed forces of the United States, including members of the Tennessee army and air national guard, are entitled to a leave of absence from their jobs, without loss of time, pay, regular leave or vacation, impairment of efficiency rating, or any other rights or benefits to which they are otherwise entitled, for all periods of military service during which they are engaged in the performance of duty or training in the service of this State, or of the United States, under competent orders. When performing military service, the officer or employee is entitled to receive his or her full salary or compensation for up to, but not exceeding, 20 working days in any one calendar year. After the 20 working days of full compensation, any public employer may, but is not required to, provide partial compensation to its employees while under competent orders. Also, after the 20 working days of compensation reservists may use up to 5 days of sick leave in lieu of annual leave for the purpose of not having to take leave without pay.

Paid leave is required under T.C.A. § 8-33-109 regardless of whether the employee is a full-time or part-time employee. The statute also applies to weekend National Guard drills when an employee must miss scheduled weekend work to attend these drills under orders issued by their unit commanders.

It is important to note that, while T.C.A. § 8-33-109 grants paid military leave for up to 20 working days in any one calendar year to county officers and employees while they are performing military service, the Attorney General has opined that this statute does not provide for the continued accumulation of vacation or sick leave while a covered person is on military leave. Rather, the purpose of the statute is to protect the rights and benefits that the military member has already earned, such as seniority and accrued leave time.

In addition to the provisions of T.C.A. § 8-33-109, sheriff's deputies, police officers, and firefighters, who served or serve on active duty in the armed forces of the United States during Operation Enduring Freedom or any other period of armed conflict prescribed by presidential proclamation or federal law that occurs following the period involving Operation Enduring Freedom, are entitled to receive the cash salary supplement provided pursuant to T.C.A. §§ 38-8-111 and 4-24-202, respectively, if their military service prevented or prevents them from attending an in-service training program.

Tennessee Code Annotated § 8-33-102 provides re-employment rights after discharge from military service. County employees who leave a position in order to perform military duty must apply for re-employment within 90 days after being released or discharged from military duty. An
employee who makes the proper application, and was not dishonorably discharged, shall, "[i]f still physically qualified to perform the duties of such position, be restored to such position if it exists and is not held by a person with greater seniority, otherwise to a position of like seniority, status and pay."[5] A county employee who is not qualified to perform the duties of his or her prior position due to a disability sustained during military service, "shall be placed in such other position, the duties of which such employee is qualified to perform as will provide the employee like seniority, status and pay, or the nearest approximation thereof consistent with the circumstances of the case."[6]

Tennessee Code Annotated § 8-33-104 provides additional rights after re-employment following discharge from military service. Any person who is restored to a position in accordance with this law is considered as having been on furlough or leave of absence during the period of military duty. A restored employee cannot be discharged without cause within one year after restoration. The employee is entitled to be restored without loss of seniority (including, upon promotion or other advancement following completion of any period of employment required therefore, a seniority date in the advanced position that will place the person ahead of all persons previously junior to the person who advanced to the position during the employee’s absence in armed forces). Upon reinstatement, the employee also is entitled to participate in insurance (including retirement, pension plans and medical insurance) and other benefits dependent on length of employment, including vacation privilege and severance pay. The employee is protected against reduction in seniority, status, or pay during employment, except as such reduction may be made for all employees whose employment situations are similar.

Under T.C.A. § 8-33-110, all officers and employees of this state, or any department or agency of state, or of any county, municipality, school district, or other political subdivision, all other public employees of this state, and all private sector employees who are members of the Tennessee army and air national guard, the Tennessee state guard, or civil air patrol and are on active state duty pursuant to § 58-1-106 are entitled to following protections subject to the eligibility requirements described below and in addition to the leave of absence provided in T.C.A. § 8-33-109.

1. An unpaid leave of absence from their respective duties, without loss of time, pay not specifically related to leave of absence time, regular leave or vacation, or impairment of efficiency rating for all periods of service during which they are engaged in the performance of duty or training in the service of this state under competent orders, including the performance of duties in an emergency; and
2. Equivalent protections regarding the right to reemployment to those protections afforded under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) (38 U.S.C. § 4301 et seq.) to service members called to federal active service.

To be eligible for protections provided above, a person must satisfy the following conditions:

1. A person whose period of service in the uniformed services was 30 days or less must report for work to the person's employer not later than the first full regularly scheduled work period following a period of eight hours after the person has completed service and has been safely transported to the person's residence, unless reporting for work within that time period is not reasonably practicable through no fault of the person, in which case the person must report for work as soon as reasonably practicable;
2. A person whose period of service in the uniformed services was greater than 30 days but not more than 180 days must apply for reemployment with the person's employer within 14 days after completion of the person's period of service, unless doing so is not reasonably practicable through no fault of the person, in which case the person must apply for reemployment as soon as reasonably practicable; or
3. A person whose period of service in the uniformed services was greater than 180 days must apply for reemployment with the person's employer within 90 days after completion of the period of service.

Persons covered under T.C.A. § 8-33-110 must provide advance notice to their employer that they have been called to active duty unless doing so is impossible or unreasonable under the circumstances.

The chancery court for the jurisdiction for which the person is employed has jurisdiction and
authority to enforce and order compliance with T.C.A. § 8-33-110.

[1] Under state law it is a Class E felony for any person, firm or corporation to refuse employment to any person for the sole reason that the person is a member of the Tennessee national guard or to terminate the employment of any such person for such reason or because of absence from employment while attending any prescribed drill, including annual field training. T.C.A. § 58-1-604.


**Workers' Compensation**

Reference Number: CTAS-180

The Tennessee Workers’ Compensation Law is a no-fault statutory scheme for compensating employees who suffer injuries in the scope of their employment. In private industry, on-the-job injuries are governed by these laws, but counties are not covered by the Workers’ compensation laws unless they choose to be covered. A county’s decision to come under these laws is effective 30 days after the county files written notice of exercising this option with the Workers’ Compensation Division of the Tennessee Department of Labor and Workforce Development. The county may cancel at any time by giving the same type of written notice. A county, through its legislative body, can choose to cover only designated departments and may also cancel coverage on a selective basis.

Elected officials do not fall within the definition of “employee” and therefore are not covered under the Workers’ Compensation Law. While volunteers also generally are not considered covered employees, volunteer firefighters and rescue personnel are considered covered employees under a special provision in the law.

The Tennessee Department of Labor and Workforce Development’s Workers’ Compensation Division is responsible for the administration of the state Workers’ compensation program. From the Labor and Workforce Development Website the employer can download all of the necessary forms used in connection with Workers’ compensation claims, as well as other useful information about the program. To request assistance by telephone, call 1 (800) 332-2667 or (615) 532-4812.


**Retirement**

Reference Number: CTAS-181

Title 8, Chapter 35 of the *Tennessee Code Annotated* contains the statutory framework for counties to participate in the Tennessee Consolidated Retirement System (TCRS). The county legislative body may authorize all of its employees in all of its departments to participate in the TCRS with the county making the employer’s contribution into the TCRS. Membership is then optional for each employee presently employed at the date of approval of membership by the
board of trustees of the TCRS, and is mandatory for all eligible employees entering the employment of the county after that date. The county legislative body may make certain elections for coverage of its employees, such as cost-of-living benefits. Special rules apply for participation in the TCRS by county officials.

A county may set a mandatory retirement age for members of the TCRS retirement system who are employed as firefighters or law enforcement officers. If these employees are in a supervisory or administrative position, they must be allowed to continue in service until they reach the age at which they are eligible for federal Social Security benefits. Any member who serves as chief of a fire department or police department may continue in service beyond the age at which the person is eligible for federal Social Security benefits.

These retirement statutes are complex, and amendments are made to these statutes by the General Assembly each year. The staff and legal counsel for the TCRS are available to help county officials with questions concerning the retirement program and to help individual participants with benefits questions.

Under T.C.A. § 8-25-101 et seq. and § 8-25-304, counties are authorized to offer their employees tax-deferred compensation plans, which includes plans under § 457 and § 401(k) of the Internal Revenue Code. These plans allow a reduction of salary so that pretax dollars can be used to fund retirement savings accounts.

The Tennessee Consolidated Retirement System (TCRS) has a Web site containing employer manuals and forms and other useful information for employers and employees concerning the state retirement system. The TCRS office is located at 502 Deaderick Street on the 15th Floor of the Andrew Jackson Building in Nashville, Tennessee 37243-0201. The office may be reached by telephone at (800) 922-7772.

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**Miscellaneous Personnel Issues**

Reference Number: CTAS-182

**Fingerprinting and Background Checks**

Reference Number: CTAS-1077

Under T.C.A. § 5-1-126, a county may require persons, prior to employment with the county, to agree to the release of investigative records to the county for the purpose of verifying the accuracy of criminal violation information contained on an employment application, and supply a fingerprint sample and submit to a criminal history records check to be conducted by the Tennessee Bureau of Investigation (TBI). In addition, to the extent permitted by federal law, and at the discretion of the county, a check of such prints may be made against records maintained by the Federal Bureau of Investigation (FBI).

The county is responsible for payment of any costs incurred by the TBI or the FBI in conducting these investigations, but the county may require an applicant to pay these costs if the applicant is offered and accepts a position with the county. The county may establish the job titles or classifications to which these requirements apply, but the classifications do not supersede any mandatory fingerprint-based criminal history background requirements that may be applicable for any person who is seeking employment in a position in any program subject to licensure, approval or certification by any state agency (for example, teachers and others working with children).
Immigration and Form I-9

Reference Number: CTAS-1078

Federal Law.

Under the federal Immigration Reform and Control Act of 1986, employers are required to have all employees who were hired after November 6, 1986, to complete an Employment Eligibility Verification Form (Form I-9) when they begin employment. Failure to comply with the requirements of the Immigration Reform and Control Act of 1986 can lead to civil penalties for knowingly hiring unauthorized employees or for failing to comply with recordkeeping requirements.

The Form I-9 is not filed with any agency, but instead it is to be retained within the county in the employee’s personnel file. In order to comply with this law, employers must do the following:

1. Have each new employee fill out Section 1 of Form I-9 as soon as they start to work.
2. Check documents establishing the employee’s identity and eligibility to work.
3. Properly complete Section 2 of Form I-9.
4. Retain the form for three years after the date of hire, or one year after employment ends, whichever is later.
5. Present the form for inspection if requested by the U. S. Immigration and Naturalization Service (INS), the U. S. Department of Labor (DOL), or the Office of Special Counsel for Immigration Related Unfair Employment Practices.

Employers must not discriminate on the basis of national origin or citizenship. An employer is prohibited from requesting anyone to present more or different documentation than what is required. All employees must complete the form regardless of national origin or citizenship status.

Note that in 2003 the services formerly provided by INS were transferred to the U. S. Citizenship and Immigration Services (USCIS), a division of the Department of Homeland Security. The USCIS administers immigration services formerly handled by the Immigration and Naturalization Service (INS), including the I-9 form. Information to assist employers with issues concerning the employment of non-U.S. citizens can be obtained from USCIS.

USCIS Web site

The USCIS has a toll-free information number: 1 (800) 375-5283.

The field office serving Tennessee is located in Memphis:

U. S. Citizenship and Immigration Services
Memphis Field Office
80 Monroe Avenue, 7th Floor
Memphis, Tennessee 38103

State Law.

State law prohibits an employer from knowingly employing, rehiring, recruiting, or employing persons who are unlawfully in the United States. T.C.A. § 50-1-103. An employer will not be in violation of this prohibition if the employer obtained and documented, after commencement of employment, lawful resident verification information (I-9), or if the employer verified the work authorization status of the employee using E-Verify.

The Tennessee Unlawful Employment Act, T.C.A. § 50-1-701 et seq., imposes two additional requirements on Tennessee employers that are different from the federal Form I-9 requirements: (1) employers must document employment eligibility for non-employees (defined as any individual, other than an employee, paid directly by the employer in exchange for the individual's labor or services) as well as employees; and (2) employers must retain copies of the documentation.[1]

For non-employees, employers must obtain and maintain a copy of any one of the following
documents: (1) valid Tennessee driver license or photo ID issued by department of safety, (2) valid driver license or photo ID issued by another state that has been determined by the department of labor and workforce development to have issuance requirements at least as strict as those in Tennessee, (3) official birth certificate issued by a U.S. state, jurisdiction, or territory, or the U.S. government, (4) valid, unexpired U.S. passport, (5) U.S. certificate of birth abroad, (6) report of birth abroad of a U.S. citizen, (7) certificate of citizenship, (8) certificate of naturalization, (9) U.S. citizen identification card, or (10) valid alien registration documentation or other proof of current immigration registration recognized by the U.S. department of homeland security containing the person’s complete legal name and current alien admission number or alien file number(s). T.C.A. § 50-1-703. For employees, employers must either (1) obtain and maintain one of the foregoing documents, or (2) enroll in and use the E-Verify system to verify the employment status, and maintain a record of the results generated by E-Verify. Verifying employment with E-Verify is a defense to a charge of hiring undocumented immigrants, but obtaining one of the listed documents, if this is the only evidence the employer has, is not a defense to such a charge. The employer must maintain records generated by E-Verify or the alternate documentation for 3 years after the date of employee’s hire or 1 year after termination, whichever is later. T.C.A. § 50-1-703.

If an employer does not have internet access or less than thirty-five (35) full-time employees, the department of labor and workforce development’s office of employment verification assistance is required to enroll at the employer in the E-Verify program or conduct work authorization status checks of the employer’s employees by using the E-Verify program, at no charge, as long as the employer signs a prescribed form, under the penalty of perjury, that the employer is qualified for assistance and completes paperwork required by the E-Verify program to permit the office to provide the assistance. T.C.A. § 50-1-703.

State citizens and employees of federal agencies are authorized to file complaints with the department of labor and workforce development alleging violation of this law. Civil penalties are as follows: $500 for first violation, plus $500 for each employee or non-employee not verified; $1,000 for second violation, plus 1,000 for each employee or non-employee not verified; $2,500 for third or subsequent violation, plus $2,500 for each employee or non-employee not verified. The commissioner is authorized to issue a warning in lieu of penalties for a first violation if the employer complies with all remedial action ordered and the commissioner finds that the failure to obtain proper documentation was not a knowing violation. Money collected goes to the lawful employment enforcement fund for enforcement and education efforts. T.C.A. § 50-1-703. Names and information of violators will be posted on the department’s website. T.C.A. § 50-1-705. If an employer does not terminate an employee for whom the employer received a final non-confirmation result from E-Verify, the commissioner may consider this fact in determining whether to impose civil penalties. T.C.A. § 50-1-709.

There is no cause of action for wrongful or retaliatory discharge against and employer if (1) the employee is not authorized to work in the United States; and (2) the employer was not aware that the employee was not authorized to work in the United States under federal immigration laws. T.C.A. § 50-1-802.

If an employer discovers that an employee is not authorized to work in the United States through results produced by the E-Verify program, as defined in § 50-1-702, and discharges
the employee based on those positive results, then the employee does not have a cause of action for discrimination based on national origin for the discharge. T.C.A. § 4-21-409.

**E-Verify.**

E-Verify is an Internet-based system that allows employers to determine the eligibility of their employees to work in the United States. It is administered by the U.S. Department of Homeland Security, USCIS, Verification Division, and the Social Security Administration. Employers submit information taken from a new hire's Form I-9 (Employment Eligibility Verification Form) through E-Verify to the Social Security Administration and U.S. Citizenship and Immigration Services (USCIS) to determine whether the information matches government records and whether the new hire is authorized to work in the United States.

An advantage to using E-Verify under state law is that verifying employment with E-Verify is a defense to a state criminal charge of hiring an unauthorized alien, but obtaining one of the listed documents, if this is the only evidence the employer has, is not a defense to such a charge. Under federal law, the use of E-Verify creates only a rebuttable presumption that the employer has not knowingly hired an unauthorized alien.

More information about E-Verify can be found here: [https://www.uscis.gov/e-verify](https://www.uscis.gov/e-verify).

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[1] Employers are currently required under federal law to complete an I-9 form for all employees, but this does not extend to non-employees such as independent contractors. Also, federal law does not require employers to retain copies of identification documents used to complete the form I-9.

**Residency Requirements**

Reference Number: CTAS-1079

Under a state law found at T.C.A. § 8-50-107, county employers can require all new employees hired after a certain date to be residents of the county, but counties cannot dismiss or penalize current employees solely on the basis of non-residence in the county.[1] Because county government is the servant of the area lying within its jurisdiction, a county may want to adopt a requirement that employees reside within the county. A residency requirement could be viewed as a method of providing job opportunities to residents who pay taxes in a particular county. A county employer that desires to enact a residency requirement should make it effective for all employees hired after the creation of the policy. In order to avoid requirements that could impact some group or class of people in a discriminatory way, new employees should be given time to comply with the residency provisions if they do not already live in the designated area.[2]

**First Responders.** Counties are prohibited from denying employment, dismissing, disciplining, fining, or penalizing a first responder based on where the first responder resides. First responders include paid, full-time law enforcement officers, firefighters, emergency medical personnel, and dispatchers of law enforcement, fire, and emergency medical service departments, but do not include the chief or head of department. This law does not apply in Hamilton County. T.C.A. § 8-50-107(d).

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[2] The constitutionality of governmental employers imposing residency requirements is
discussed in Op. Tenn. Att’y Gen. 01-007 (Jan. 17, 2001), wherein the Attorney General opined that such requirements are considered constitutional under the Commerce Clause, the Privileges and Immunities Clause, and, as long as a rational basis for the requirement exists, under the Equal Protection Clause of the United States Constitution, as well as under the Tennessee Constitution. See *Civil Service Merit Bd. of City of Knoxville v. Burson*, 816 S.W.2d 725 (Tenn.1991). See also Op. Tenn. Att’y Gen. 12-92 (Oct. 3, 2012).

**Nepotism**

Reference Number: CTAS-1080

While there is no direct statutory prohibition against the employment of relatives in county offices, it is possible that there are some instances in which it could cause a conflict of interest, particularly where the relatives commingle their assets.\[1\] It also is easy to see how relatives supervising other relatives could cause management problems in the workplace, and many county offices have adopted policies against this. The county legislative body, however, is not authorized to enact a resolution prohibiting other elected officials from employing relatives.\[2\]

The General Assembly has enacted a statutory anti-nepotism policy that applies to employees of the state (excluding the legislative branch), which is found in T.C.A. § 8-31-101 *et seq*. The state’s policy does not absolutely prohibit relatives from working within the same governmental entity, but it does prohibit relatives from being placed within the direct line of authority whereby one relative is responsible for supervising the job performance or work activities of another relative. These statutes could be used as a guide for county officials wishing to adopt nepotism policies.

With regard to employees within the local school system, while there is no statutory prohibition against relatives working for the local education agency (LEA) there are provisions requiring members of local school boards having relatives employed by the board to disclose the relationship before voting on any matters affecting the relative, including but not limited to the annual budget, tenure, and personnel policies. The director of schools must notify the board when there is intent to employ a relative of either a school board member or of any other elected county official, certifying that the person is qualified to occupy the position. If two or more relatives are, or become, within the same line of direct supervision by marriage or promotion, the director of schools must attempt to resolve the situation by transferring one of the employees, and if that fails, must devise an alternate evaluation plan. T.C.A. § 49-2-202(a).

\[1\] See T.C.A. § 12-4-101.

\[2\] Op. Tenn. Att’y Gen. 82-68 (Feb. 12, 1982). Some counties have adopted county-wide nepotism policies by private act and while the Attorney General has opined that this is permissible, the constitutionality of such a private act has not been tested in court. See Op. Tenn. Att’y Gen. 82-283 (June 3, 1982).

**Personnel Files**

Reference Number: CTAS-1081

An important element of a sound personnel system is a complete and accurate set of personnel records for each employee. The file should contain documents which, when viewed in chronological order, would provide a complete history of that employee’s employment with the government. Included in the personnel file should be the employment application, date of hire, rate of pay, *attendance record, immigration form 1-9*, performance evaluations and any other information that is identifiable with that particular employee.

The information in the personnel file becomes important when problems arise with the Fair Labor Standards Act, Equal Employment Opportunity Commission complaints or simply to settle disputes that might exist with or between employees. Some of these records are required by law to be kept and others are required by common sense to be maintained.

Medical information contained in personnel files is confidential and must be maintained in a
separate file pursuant to the Americans with Disabilities Act. See the retention schedules for information contained in personnel files.

**Compensation Plans**

Reference Number: CTAS-1082

While the adoption of a compensation plan (also known as a pay plan or compensation schedule) is not required by law, an employer may want to adopt a pay plan to avoid conflicts and misunderstandings with and between employees. The employer should be careful to ensure that equal pay is given to employees who perform equal work. Differences in pay can exist, however, to reward tenure and performance.

The most efficient way to make sure that employees are properly compensated is to first create a job description for each position. Then, a salary range is assigned to each position based upon the knowledge, skills and abilities needed to fill that position. The salary range for each position can include several levels or steps so the employer can reward the employee’s performance or continued loyalty to the employer.

**Breaks**

Reference Number: CTAS-1083

State law requires that private employers give a 30-minute unpaid rest break or meal period to employees who are scheduled to work six hours consecutively, except in workplace environments that by their nature of business provide for ample opportunity to rest or take an appropriate break. T.C.A. § 50-2-103. However, this statute does not apply to public employers such as counties. Op. Tenn. Att’y Gen. 94-060 and 08-187. Many personnel advisors suggest, however, that allowing each employee a short break or rest, during morning and afternoon, may increase the productivity of the employee. Break periods also can be used by the employer to handle smoking problems within an office setting. No smoking or limited smoking policies are becoming prevalent in today’s work force. The employer can allow the use of morning and afternoon breaks for employees who smoke. Since this break time is considered work time under the Fair Labor Standards Act, the employee would receive regular pay during this period.

All employers, both public and private, are required to provide reasonable unpaid break time each day to an employee who needs to express breast milk for that employee’s infant child. These break periods are to run concurrently with any other breaks the employer provides whenever possible. The employer must make reasonable efforts to provide a room or other location in close proximity to the work area, other than a toilet stall, where the employee can express breast milk in privacy. T.C.A. § 50-1-305.

**Smoking in the Workplace**

Reference Number: CTAS-1084

Under Tennessee's Non-Smoker Protection Act, T.C.A. § 39-17-1801 et seq., smoking, which includes the use of vapor products, is prohibited in any enclosed area under the control of a public (or private) employer that employees normally frequent during the course of employment. The act requires “No Smoking” signs or the international "No Smoking" symbol be clearly and conspicuously posted at every entrance to every place of employment where smoking is prohibited by the act by the owner, operator, manager, or other person in control of that place. A person who smokes in an area where smoking is prohibited is subject to a fifty-dollar ($50) fine.

The Non-Smoker Protection Act does not apply to outdoor areas, as long as smoke from those areas does not infiltrate into areas where smoking is prohibited. T.C.A. § 39-17-1804. Employees who smoke may be required to do so only at specified times and in specified places that are not in violation of the law.

State law protects employees who use tobacco products from being discharged from employment solely because they use tobacco products, as long as the employee complies with all of the employer's policies regarding the use of tobacco products during working hours. T.C.A. § 50-1-304. This law does not, however, prohibit an employer from refusing to hire someone who uses tobacco products.
Monitoring of Electronic Mail

Reference Number: CTAS-1085

Counties are required to have a written policy in place if they monitor electronic mail communications in any way. This policy must include the circumstances under which the monitoring will be conducted, and a statement that correspondence of the employee may be a public record and be subject to public inspection. T.C.A. § 10-7-512.

Insurance

Reference Number: CTAS-1086

Two sets of statutes coexist that authorize counties to provide group insurance for county employees and officials. Under T.C.A. §§ 8-27-401 through 8-27-404, the county legislative body is authorized to provide group life, hospitalization, disability and medical insurance for county employees, and to provide for payment by the county of a portion of the premiums. The county legislative body is authorized to include retired county employees, officials, and their surviving spouses. The county legislative body approves the insurance contracts by majority vote. The county legislative body is also authorized to include volunteer firefighters who have passed the Firefighter I exam and have practiced as a volunteer firefighter for at least one year after completion of the exam before making application for benefits, as set out in T.C.A. § 8-27-401(b)(1)(B). Under T.C.A. § 8-27-404, counties that have elected to provide health insurance to first responders are authorized to provide health insurance to the surviving spouses and children of first responders who are killed in the line of duty, for a period not exceeding two years after the death of the first responder. Any county that provides this insurance is to notify the commissioner of finance and administration, and the state will reimburse the county in an amount equal to the portion of health insurance premiums and benefits for which the county is responsible under the health insurance policy. “First responders” means paid, full-time law enforcement officers and firefighters.

Counties also are authorized to provide group life, hospitalization, disability and medical insurance under T.C.A. § 8-27-501 et seq. Under this set of statutes, all county employees and county officials have the option of electing the coverage, and the county is authorized to pay all or any portion of the premiums with the remainder to be deducted from the employees’ salaries. The county legislative body is authorized to include retired county employees, officials and their surviving spouses. A county insurance fund must be established for deposits of the county’s share of the premiums as well as the payroll deductions. Once established, the insurance program cannot be discontinued except by two-thirds vote of the county legislative body and after three months notice to officials and employees.

On the state level, a local government insurance committee was created by the legislature in 1989 to establish a health insurance plan for employees of local governments and certain quasi-governmental organizations, with all costs of the plan to be paid by the participating local governments and eligible quasi-governmental organizations. The staff of the state group insurance program is to act as the staff of this program.\[1\]

A state supported local education employee group insurance program is established under T.C.A. § 8-27-301 et seq. Group insurance is available under either the basic state plan or an optional plan.\[2\] The state pays a portion of the cost of participation in the plan.\[3\] Local education agencies that have group insurance determined to be equal to or better than the state plan are eligible for direct payments from the state for a portion of the costs.\[4\]

If a county employee rejects or opts out of an insurance policy offered to the employee, the county may pay up to 15% of the premium that would have been paid by the county as long as the county continues to offer insurance coverage to its employees. T.C.A. § 8-27-503. Additionally, the Attorney General has opined that counties may provide “cafeteria plans” under § 125 of the Internal Revenue Code as a benefit to their employees.\[5\] Cafeteria plans are authorized under T.C.A. § 8-25-501.\[6\]

The Tennessee Supreme Court has held that unless a county employer expressly provides that benefits such as health insurance are intended to vest or are not to be terminated, those benefits
may be modified or terminated at any time. Benefits of this type are welfare benefits, and must be
distinguished from retirement or pension benefits that vest automatically.[7]

[6] This statute also authorizes counties to have “qualified transportation fringe benefit plans”
authorized under I.R.C. § 132(f).

Expense Accounts
Reference Number: CTAS-1087
In counties having a population of 100,000 or more according to the latest federal census, salaried
county officials who are paid from county funds and are elected by the people, the county
legislative body or another board or commission, and any clerk or master appointed by the
chancellor, must be reimbursed for actual expenses incurred incident to holding office, including
but not limited to lodging while away on official business and travel on official business, both
within and outside the county. The county legislative body may by resolution determine what
other expenses are reimbursable.[1]

In all other counties, the county legislative body may by resolution choose to pay the expenses of
elected officials, and may promulgate procedural rules regarding the method and type of expenses
reimbursed. In counties where such a resolution has been adopted, the county mayor: (1)
prescribes forms to be used to reimburse expenses; (2) examines expense reports or vouchers to
insure items are legally reimbursable and filed according to legislative body rules; and (3)
forwards proper expense reports to the disbursing officer for payment.[2]

All officials who are authorized to incur reimbursable expenses are required to make out accurate,
itemized expense accounts showing the date and amount of each item and the purpose for which
the item was expended. The official must swear before an officer qualified to administer oaths that
the expense account is correct and that the expenses were actually incurred in the performance of
an official duty. Receipts should be attached to the expense voucher whenever practical, and
vouchers must be numbered and referred to by number.[3] Making a false oath on an expense
account constitutes perjury.[4]


Firearms in the Workplace
Reference Number: CTAS-2206
Under T.C.A. § 39-17-1314, counties, cities, and metropolitan governments are authorized to
regulate by resolution, ordinance, policy, rule, or other enactment the carrying of firearms by
employees or independent contractors of the county or city or metropolitan government when
acting in the course and scope of their employment or contract, except as otherwise provided in
T.C.A. § 39-17-1313. Under this statute the county may, by action of the county legislative body,
allow or prohibit the carrying of firearms and may establish rules setting out circumstances under which firearms are allowed to be carried by their employees or contractors.

Counties choosing to allow employees to carry firearms at work should contact their liability insurance carrier to determine the extent of their insurance coverage. Also note that employees who carry firearms at work would be required to follow all applicable federal and state laws, rules, and regulations, including obtaining and maintaining a carry permit if applicable.

The sheriff is the only elected official that has statutory authority to authorize employees to carry a weapon, pursuant to T.C.A. § 39-17-1315.

Automobiles
Reference Number: CTAS-1088
Subject to appropriation by the county legislative body, counties may provide vehicles for the use of any salaried county official who is paid from county funds and who holds office by election of the people, by election of the county legislative body, or by election of any other county board or commission, and any clerk or master appointed by a chancellor, or, in the alternative, may provide a monthly car allowance to such salaried county officials. T.C.A. § 8-26-113.

Fringe Benefits
Reference Number: CTAS-1089
Fringe benefits are taxable for purposes of federal income tax and FICA tax. The most common form of fringe benefit provided by counties is the automobile. The amount of the taxable fringe benefit is the value of the amount of personal use of the automobile (as opposed to use for county purposes). There are four methods of calculating the value of the personal use of the vehicle:

1. fair market value method,
2. table value method,
3. cents-per-mile method, and
4. commuting value method.

The first two methods are based on the value of the automobile and the actual amount of personal use. The cents-per-mile method is the number of personal miles driven by the employee multiplied by the standard mileage rate, which is the same as the rate taxpayers use to deduct the business use of a personally owned car. If the employee pays for the gas, the rate is reduced. The commuting value method can be used only when the employer has a written policy that restricts the employee’s personal use of the car to commuting to and from work. Under the commuting value method the use is valued at $1.50 per one-way commute, or $3.00 per round trip. The commuting value method can be used only for ordinary employees. It cannot be used for elected officials or certain other highly compensated employees. The rules governing taxation of fringe benefits are complex and must be carefully reviewed. These regulations can be found at 26 C.F.R. § 1.61-21.

Wage Assignments and Garnishments
Reference Number: CTAS-1090
Garnishment of wages, salaries or other compensation due from a county to any of its officers or employees is permitted.[1] Employers cannot retaliate against an employee based on a wage assignment for alimony or child support, but the employer may impose a service charge of up to five percent, not to exceed $5.00 per month.[2] The maximum amount of earnings that may be garnished is set out in T.C.A. § 26-2-106. For federal law regarding garnishments, see 15 U.S.C. § 1672(b).
Whistleblower Statute

Reference Number: CTAS-1091
State law, found at T.C.A. § 50-1-304, prohibits an employer from terminating an employee solely for refusing to participate in an illegal activity or for refusing to remain silent about an illegal activity. Illegal activities are defined as those that are in violation of a state law (either criminal or civil) or any regulation intended to protect the public health, safety or welfare. Employees who are terminated in violation of this statute may sue the employer for retaliatory discharge. However, if an employee files a frivolous lawsuit for retaliatory discharge the employee may be required to pay the other party's attorney's fees and expenses.

Part-Time Employees

Reference Number: CTAS-1092
Employers may not want to provide the same benefits to part-time employees that full-time employees enjoy. So that there is no confusion on this issue, personnel policies should include a statement defining “part-time employee” and discussing the role and benefits of the part-time employee. The recordkeeping procedures of the Fair Labor Standards Act, provisions on discrimination and sexual harassment, breaks, and in-line-of-duty injury are all areas that affect part-time employees. However, benefits such as health insurance, sick leave, vacation time, holidays, bereavement leave, and other types of paid leave are often not extended to the part-time employee, and this should be clearly established in the policies. Because there is no law that establishes the maximum number of hours worked by part-time employees, the employer’s policy must define this point.

COBRA

Reference Number: CTAS-1093
The Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) applies to all employers who had 20 or more workers on a typical business day during the past calendar year and offered their employees health coverage. Although there are many provisions and regulations in COBRA, local government health plans are affected only by the continuation coverage requirements. In order to comply with COBRA, the government employer has the obligation to notify the employee of the right to continue health care coverage for a certain period of time at the group rate upon the occurrence of a qualifying event. A qualifying event includes but is not limited to such things as termination of employment (except for gross misconduct), death of the covered employee and reduction in hours of employment. Once the qualifying event occurs, the employee or qualified beneficiaries must then be given at least 60 days to elect continuation of health care coverage. The length of time coverage can be continued depends upon the qualifying event.

It is recommended that the county employer consult with its county attorney or health plan administrator for more detailed information if needed.

[1] Public employees covered by government health plans are technically exempt from COBRA, but they are covered by parallel requirements under the Public Health Service Act.

Termination Pay

Reference Number: CTAS-1094
When an individual’s employment comes to an end, for whatever reason, he or she is legally entitled to payment for all accrued overtime, compensatory time and regular earnings. The employee also may be entitled to payment for accrued but unused sick leave or vacation time, or some other type of compensable leave, depending on the employer’s policies. The employer should include a provision in the personnel manual explaining termination pay.
Upon the death of an employee, some wages often will have been earned but not paid. Generally, money that is owed to a deceased person must be paid to the executor or administrator of the estate. Pursuant to T.C.A. § 30-2-103, however, the employee may designate a beneficiary to receive payment of any wages that may be due the employee at the time of death, and employers are encouraged to advise their employees of this option. If the employee has not designated a beneficiary, the employer may pay limited amounts to the surviving spouse, and to surviving children, under the circumstances specified in the statute. The current limit is $10,000.

**Unemployment Compensation**

**Reference Number: CTAS-1095**

Under the Tennessee Employment Security Law,[1] unemployment insurance coverage is mandatory for county and other local government entity employees. All county employees are covered except popularly elected officials, members of the county legislative body, judges, members of the state national guard or air national guard, employees serving on a temporary basis in case of emergency (fire, storm, snow, earthquake, flood, etc.), and those in a position that is designated according to law as “a major non-tenured policymaker or advisory position” or “a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week.”[2]

Unemployment insurance premiums must be paid by the employer; no part of the premiums can be deducted from employees’ wages. Governmental employers may finance unemployment insurance by implementing the reimbursement method or the premium/tax method. Under the reimbursement method, the employer submits quarterly payments to the Tennessee Department of Employment Security for the exact amount of unemployment benefits paid to former employees and chargeable to the employer’s account. Under the premium/tax method, the assigned premium rate will be 1.5 percent until the account has been chargeable with benefits and subject to contributions throughout the 36 consecutive calendar month period ending on the computation date (the December 31 preceding a tax rate year that begins on July 1). After this condition is met, the governmental employer’s premium/tax rate will be computed according to a new rate table for governmental employers only. Tax rates will range from 0.3 percent to 3 percent, depending on the reserve ratio. The reserve ratio is computed by subtracting cumulative benefits charged to the employer’s reserve account from cumulative contributions paid and dividing the difference by the average taxable payroll of the three recent calendar years.[3]

Counties that wish to change their method of financing must file a written notice with the Department of Employment Security not later than 30 days prior to the beginning of the taxable year the change becomes effective. When a change is made from the reimbursement method to the premium/tax method, the employer remains liable for reimbursement of unemployment benefits that are paid after the change but are based on wages paid before the change. Benefit changes can occur up to nine calendar quarters after an employer pays wages to a worker. Either the fee official or the county may be deemed the employer, depending upon whether the fee official or the county pays the deputies and assistants.

When an employee is terminated, the employer is required to provide the employee with a Separation Notice within 24 hours of the time of separation stating the reasons for termination.[4] The employee takes the notice to the Department of Labor and Workforce Development if he or she wishes to file a claim for unemployment. The reasons for an employee’s termination may affect unemployment compensation benefits. Employees who voluntarily quit or who are discharged for job-related misconduct are not eligible to receive unemployment compensation benefits. Former employees receiving unemployment benefits must be able to work, available for work, and making reasonable efforts to secure suitable work.[5]

Information concerning the application and benefits of the unemployment security program can be obtained from local offices of the state Department of Employment Security. The Tennessee Department of Labor and Workforce Development’s Employment Security Division administers the Unemployment Insurance Program. On the Labor and Workforce Development Website the employer will find a wealth of information concerning this program, including an Employer Handbook, contact information for the Employer Accounts Offices across the state, and forms. Also, employees can file unemployment claims electronically here.
Providing Employee Information to Prospective Employers

Reference Number: CTAS-1096

Employers are granted qualified immunity from liability for providing information, upon request of a prospective employer, about a current or former employee’s job performance as long as the information provided is truthful, fair and unbiased.¹

¹ T.C.A. § 50-1-105.

FIT, FICA Withholding, and Miscellaneous Reporting Matters

Reference Number: CTAS-1147

Counties are responsible for making the proper FICA and FIT withholdings. The county makes quarterly payments and reports to the Internal Revenue Service and the Social Security Administration. Counties must be aware of the taxation of fringe benefits, particularly the use of county-owned vehicles, as being income to the employees. If the county fails to make the proper withholdings from income, serious penalties can be imposed by the Internal Revenue Service. County officials may be responsible for filing Form 1099s with the IRS to report these benefits.

Commercial Driver Licenses

Reference Number: CTAS-1148

County employees operating commercial type vehicles and those requiring a special endorsement must obtain a commercial driver license in order to operate many county vehicles. Vehicles (including vehicle combinations) that fall within the commercial classification include the following:

1. Vehicles weighing more than 26,000 pounds (gross vehicle weight rating);
2. Vehicles designed to transport more than fifteen (15) passengers (including the driver); and
3. Vehicles transporting hazardous material requiring placarding.


Vehicles requiring a special endorsement listing on a driver license include:

1. Those authorized to pull multiple trailers;
2. Those designed to carry more than fifteen (15) passengers (including the driver);
3. Tank vehicles;
4. Those transporting hazardous materials requiring placarding; and
5. School buses.

The commercial driver license requirements include passing grades on certain knowledge and skills tests as well as a good driving record. A “grandfather” provision exists that exempts certain
drivers from having to take the skills test. Furthermore, operators of emergency vehicles are exempt from these provisions.

School bus drivers must have a Class C commercial license with school bus endorsement. T.C.A. § 55-50-102; Op. Tenn. Att'y Gen. 89-122 (Sept. 21, 1989). This endorsement may be issued only if the applicant has had five years of unrestricted driving experience and can demonstrate good character, competency, and fitness. T.C.A. § 55-50-302.

Limitations of Liability for Employers

Reference Number: CTAS-2477

Under T.C.A. § 40-29-108, an action may not be brought against an employer or contracting party for negligent hiring, training, retention, or supervision of an employee or independent contractor based solely on the fact that the employee or independent contractor has been previously convicted of a criminal offense. In an action against an employer or contracting party for negligent hiring, training, retention, or supervision of an employee or independent contractor, evidence that the employee or independent contractor has been previously convicted of a criminal offense is inadmissible.

However, the above provisions of T.C.A. § 40-29-108 will not apply if the employer or contracting party knew or reasonably should have known of the employee's or independent contractor's prior conviction, and:

1. The employee or contractor was previously convicted of an offense that was committed while performing duties substantially like those reasonably expected to be completed in the employment or under the contract, or under conditions substantially similar to those reasonably expected to be encountered in the employment or under the contract; or
2. The employer or contractor was convicted of a violent offense, defined in § 40-35-120(b), or a violent sexual offense, defined in § 40-39-202.

Additionally, sections (a) and (b) of T.C.A. § 40-29-108 will not apply if:

1. The cause of action concerns the misuse by an employee or independent contractor of the funds or property of a person other than the employer or contracting party;
2. On the date the employee or independent contractor was hired, the employee or independent contractor had been previously convicted of an offense with an element which includes fraud or the misuse of funds or property; and
3. The employer or contracting party should have reasonably foreseen that the position for which the employee or independent contractor was being hired would involve managing funds or property of a person other than the employer or contracting party.

The CROWN Act

Reference Number: CTAS-2482

The CROWN Act prohibits employers from adopting a policy which does not allow employees to wear the employee’s hair in braids, locs, twists, or another manner that is part of the cultural identification of the employee’s ethnic group. A policy adopted in violation of this law is discriminatory and void.

The law does not create a private cause of action. An employee may file a complaint with the department of labor and workforce development. The department will provide a warning to an employer in violation of this section.

The law does not apply to a public safety employee if it would prevent the employee from performing the essential functions of the employee’s job and does not apply to a policy that an employer must adopt to adhere to safety standards, or to comply with federal or state laws, rules, and regulations relative to health or safety.

T. C. A. § 50-1-313.