

Employer's Legal Handbook

Chapter 1 - Hiring

Many state and federal laws—as well as countless court decisions—set out legal protocol for every phase of the employment relationship, including the hiring process. If you've correctly sensed that many workers today are well informed about their legal rights and are willing to fight to enforce them, you may be concerned about making costly mistakes during hiring.

Fortunately, you can steer clear of most of the legal perils of hiring employees by understanding and following these sensible guidelines:

- avoid illegal discrimination
- respect the applicant's privacy rights
- don't imply job security—unless you mean it
- protect against unfair competition
- observe the legal rules for hiring young workers and immigrants, and
- follow the IRS standards for hiring independent contractors.

Section A of this chapter discusses these key principles—some of which apply throughout the employment relationship and are discussed elsewhere in this book as well.

Copyright © 1999-2001 Nolo.com All Rights Reserved

A. Legal Guidelines for Hiring Employees

Most large companies maintain human resource departments and in-house lawyers to lead them through the intricacies of employment law. But if you run a small or mid-sized company, this is an unaffordable luxury. More likely, you keep a close eye on legal expenses and call a lawyer only when absolutely necessary.

The guidelines discussed here should reduce your need for outside legal help when hiring employees.

1. Avoiding Illegal Discrimination

Federal and state laws prohibit you from discriminating against an employee or applicant because of race, color, gender, religious beliefs, national origin, physical disability—or age if the person is at least 40 years old. Also, many states and cities have laws prohibiting employment discrimination based on marital status or sexual orientation.

These anti-discrimination laws apply to all stages of the employment process: preparing job descriptions, writing ads, conducting interviews, deciding whom to hire, setting salaries and job benefits, promoting employees, and disciplining and firing them.

A particular form of discrimination becomes illegal when Congress, a state legislature or a city council decides that a characteristic—race, for example—bears no legitimate relationship to employment decisions. A law or ordinance is then passed prohibiting workplace discrimination based on that characteristic. Courts get involved, too, by interpreting and applying anti-discrimination laws and ordinances.

Obviously, as an employer, you need to know the types of discrimination that are illegal. At the same time, be aware that anti-discrimination laws don't dictate whom you must hire. You can exercise a wide range of discretion based on business considerations. You remain free, for example, to hire, promote, discipline and fire employees and to set their salaries based on their skills, experience, performance and reliability—factors that are logically tied to a valid business purpose. You only risk violating the law when you treat a person or a group differently for reasons that legislators and judges have decided don't serve a valid business purpose.

Some illegal practices are obvious—such as advertising a job for people ages 20 to 30 in violation of age discrimination laws, or paying lower wages to women than men for the same work in violation of equal pay laws.

Other types of discrimination are more subtle, but just as illegal. Employment practices that have a disproportionate and discriminatory impact on certain groups are also barred by anti-discrimination laws. For example, if your main means of seeking job candidates is through word of mouth and your workforce

consists entirely of white men, the word-of-mouth recruitment can be illegal discrimination; it's likely that few people other than white men will hear about the job openings. The effect of the procedures is what counts.

To avoid violating anti-discrimination laws at the hiring stage:

- advertise job openings in diverse places so they come to the attention of diverse people
- determine the skills, education and other attributes that are truly necessary to perform the job so that you don't impose job requirements that unnecessarily exclude capable applicants, and
- avoid application forms and screening techniques that have an unfair impact on any group of applicants.

Running afoul of anti-discrimination laws can be both time-consuming and costly. An unhappy employee or applicant may sue your business. Federal and state agencies also may take legal action against it. And publicity about a violation of anti-discrimination laws can adversely affect your business reputation, driving down revenues. If word gets out that a company has discriminated against women employees, for example, women customers may avoid dealing with the company for years—even long after the discriminatory practices have been dropped.

2. Respecting Applicants' Privacy Rights

As an employer, you likely believe that the more information you have about job applicants, the better your hiring decisions will be. But there's a potential problem in mounting intensive background checks. Your attempt to assess an applicant by gathering information about the past can conflict with his or her right to privacy—and sometimes violate federal and state laws. To avoid claims that you've invaded an applicant's privacy, obtain the applicant's written consent before you send for high school or college transcripts and credit reports and before you contact a former employer.

Will It Tell You What You Need to Know?

It's often a waste of time and effort to acquire and review transcripts and credit reports—although occasionally they're useful. If you're hiring a bookkeeper, for example, experience garnered on the job is much more important than the grades the applicant received in a community college bookkeeping program 10 years ago. But if the applicant is fresh out of school and has never held a bookkeeping job, then a transcript may yield some insights. Similarly, if you're hiring a switchboard operator, information on a credit report would be irrelevant. But if you're filling a job for a bar manager who will be handling large cash receipts, you might want to see a credit report to learn if the applicant is in financial trouble.

In addition, laws and court rulings restrict your right to screen applicants through aptitude tests and drug tests.

Another privacy concern, for which legal guidelines are less clear, is your ability to control what workers do outside of the workplace. Some states have granted a measure of legal protection for an employee's off-the-job conduct. Colorado, for example, has a statute prohibiting discharge based on lawful activity off the employer's premises.

But in other states, employers are free to reject a job applicant or fire an employee whose lifestyle or conduct away from work they find distasteful. Even in such states, however, caution is in order; to be on relatively safe legal ground, it's best to avoid rejecting or firing a worker for off-duty conduct or lifestyle unless you can tie the actions to actual or highly likely business losses. In Baltimore, for example, it was OK for a bus company to fire a driver who was publicly identified as the Grand Dragon of the Ku Klux Klan. The court considering the case found that there was a real danger of physical danger and a possibility of a boycott if the driver were retained.

Some employers want to limit their employees to people who don't smoke, drink alcohol or use drugs—even off the job—to hold down healthcare costs or to keep a harmonious workforce. The emerging law is that you can't dictate such off-the-job behavior.

3. Avoiding False Job Security Promises

Traditionally, employees have had no job security. Employment has been an at-will relationship. If there's no contract for a fixed term of employment, the employee works at the will of the employer and employee; the employer can fire the employee at any time for any reason—or for no reason at all. And the employee is free to quit at any time. That's still the basic law, although you can't fire someone for an

illegal reason—because of the color of the employee’s skin, for example, or because you prefer to put a younger person in the job.

The at-will relationship gives you maximum freedom to fire employees, but preserving your legal right to fire at will can be tricky. Courts in many states have held that if employers are not careful about what they tell the employee, what they write in employee handbooks, and what they say in documents and letters, they may lose that right.

- A law firm hired Joan as a receptionist and fired her eight months later. Joan sued the law firm. She claimed that when she was hired, she was assured that she would remain employed as long as she did a good job. The court held that such assurance was sufficient to create a contract that Joan would be fired only for just cause. (*Hetes v. Schefman & Miller Law Office*, 393 N.W.2d 577 (1986).)
- A bingo hall hired Scott as a general manager and gave him an employee handbook. Later, Scott was fired without warning or suspension. He sued, claiming that the handbook stated that the employer could fire an employee only after warnings were given and disciplinary procedures were followed. The court ruled that the employer was required to follow the procedures set out in its own employee handbook and couldn’t fire Scott at will. (*Lukoski v. Sandia Indian Management Co.*, 748 P.2d 507 (1988).)

During the hiring process, don’t give assurances that you may not be able to honor and that may give an applicant a false sense of security. This restraint can be difficult when you’re trying hard to entice an attractive candidate to join your workforce. You’ll have a natural tendency to say positive things about your business, the candidate and the future relationship. But those upbeat statements can be turned against you if the employee is later fired.

Your best protection is to make sure your application forms, employee handbooks and offers of employment state that the job is at will—and to have the applicant acknowledge this in writing. Then you’ll have an excellent chance of terminating the employment on your own terms and without legal repercussions. Be aware, however, that some judges approach the whole idea of at-will employment with a measure of hostility or skepticism. These judges may disregard even the most carefully worded at-will language if it seems to be contradicted by other oral or written statements you’ve made to the applicant or new employee.

Here’s an example of language you may wish to include in your job application form:

At-Will Employment. I acknowledge that if hired, I will be an at-will employee. I will be subject to dismissal or discipline without notice or cause, at the discretion of the employer. I understand that no representative of the company, other than the president, has authority to change the terms of an at-will employment and that any such change can occur only in a written employment contract.

Initials

Another way to protect yourself is to be sure that you have a good reason for firing the person. That way the firing will be lawful, even if the employee was not an at-will employee after all.

TRUTH IN HIRING:

Statements you make during interviews and when making job offers may later be treated as binding contracts.

In a leading case, a New York law firm recruited a lawyer who was beginning to make a name for herself in environmental law. The carrot that was dangled in front of her was that she’d head an environmental law department that the firm was starting. She bit—but wound up being assigned to general litigation work instead.

*Later, when she was fired as part of a cutback, she sued the firm, claiming she’d been damaged because the firm had thwarted her career objective of continuing to specialize in environmental law. The court of appeals held that she had a valid legal theory. (*Stewart v. Jackson & Nash*, 976 F.2d 86 (2d Cir. 1992).)*

The lesson of this and similar cases is that the type of work an employee does can be important. Employees often leave one employer to join another—or turn down opportunities—because a particular job seems to offer a greater

chance for career advancement. To avoid claims that you misled an applicant about the nature of the work, stick to what you know the work will consist of rather than what you think the applicant may want to hear.

Similarly, if your company is considering staff reductions in the near future—because, for example, a major account is about to move out of the state—disclose this to applicants. Otherwise, you may find yourself on the defensive end of a lawsuit, especially if the employee left a secure job elsewhere to come work for you.

Consider, for example, the case of Andrew, who held a good job in New York City—a job that paid \$120,000 a year. According to Andrew, executives of a Los Angeles company strongly urged him to take a job with them that they said would be secure and would involve significant pay increases. The executives portrayed the company as financially strong, with a profitable future. Brushing aside Andrew’s request for a written employment contract, they told him, “Our word is our bond.”

That was good enough for Andrew. He quit his New York job, bought a home in California, moved there with his wife and two children, and began working for the L.A. company. Two years later, the company fired Andrew as part of a management reorganization. He sued, claiming that the company fraudulently induced him to give up his old job and move to California. He said that when the company executives induced him to change jobs, they falsely represented the company’s financial condition—concealing the fact that the company’s financial outlook was bleak and that the company was already planning to eliminate the job for which it was hiring him. The California Supreme Court held that Andrew could sue for both fraud and breach of contract. (Lazar v. Superior Court (Rykoff-Sexton Inc.), 49 Cal. Rptr. 2d 377 (1996).)

4. Preventing Negligent Hiring Claims

The main reason to investigate an applicant’s background is to make sure the person will do a good job for you and fit in with other employees on the staff. But sometimes there’s an additional, equally powerful reason to make a thorough investigation. When you hire someone for a position that may expose customers or others to danger, you must use special care in checking references and making other background checks.

Legally, you have a duty to protect your customers, clients, visitors and members of the general public from injury caused by employees you know or should know pose a risk of harm to others. In some states, you may also have a duty to protect other employees from an employee whom you know—or should know— is dangerous. If someone gets hurt or has property stolen or damaged by an employee whose background you didn’t check carefully, you can be sued for negligent hiring.

Be especially vigilant when hiring maintenance workers and delivery drivers, whose jobs would give them easy access to homes and apartments.

Example: The Village Green, a 200-unit apartment complex, hires Elton as a maintenance worker and gives him a master key. Elton enters an apartment and sexually molests a four-year-old girl while the child’s parents are running an errand. Had the company checked before hiring Elton, it would have discovered that Elton had just completed a prison term for a sexual offense. The child’s parents sue The Village Green for negligent hiring.

Doing a background check can be a delicate matter, since laws also require you to respect the applicant’s privacy. If you hire people for sensitive jobs, you must investigate their backgrounds as thoroughly as possible without stepping over the line and violating their privacy rights. You can be faulted for not looking into an applicant’s criminal convictions—but not for failing to learn about prior arrests that didn’t result in convictions, since such arrest records are generally protected by privacy laws.

In doing background checks on applicants for sensitive jobs, check for felony convictions and also be diligent in contacting all previous employers. Keep a written record of your investigation efforts. Insist that the applicant explain any gaps in employment history. Consider turning over the pre-hire investigation to professionals who do this for a living. If you choose to follow this route—and can afford it—it can go a long way toward refuting later claims that you failed to use reasonable efforts to learn about the employee’s history.

To learn more about negligent hiring cases, see Employer’s Guide to Workplace Torts, by Ronald M. Green

and Richard J. Reibstein (Bureau of National Affairs). It costs \$45 and can be ordered by calling 800-372-1033.

5. Protecting Against Unfair Competition

One risk you run in hiring people is that they'll later start a competing business or go to work for a competitor. If so, they may use information they gained at your workplace or contacts they made there to draw away business that otherwise would be yours.

Obviously, you need not be too concerned about the employee you hire to flip hamburgers or the clerk you hire to handle drycleaning orders. But employees who have access to inside information about product pricing or business expansion plans, for example, may pose competitive risks. The same goes for employees who serve valuable and hard-won customers—a salesperson, perhaps, who handles a \$200,000 account.

You can help protect your business from unfair competition by asking new hires to sign agreements not to take or disclose trade secrets and other confidential information. You can also ask selected employees to sign covenants not to compete with your business—although such covenants must be carefully written so that a former employee has a reasonable chance to earn a living.

For a guide on creating non-disclosure agreements for your workers to sign, see *Nondisclosure Agreements: Protect Your Great Ideas When You Share Them With Others*, by Stephen Fishman (Nolo). You can obtain this guide from Nolo's website at <http://www.nolo.com> or by calling Nolo directly at 800-992-6656.

a. Trade secrets

In hiring and working with employees, some business owners need to protect their unique assets from misuse. Some possibly protectible business assets may include, for example:

- a restaurant's recipes for a special salad dressing and muffin that draw people from miles around
- a heating and cooling company's list of 500 customers for whom it regularly provides maintenance, or
- a computer company's unique process for speedily assembling computer boards.

If they are treated as such, the recipes, the customer list and the assembly process are all trade secrets. Other examples are an unpatented invention, engineering techniques, cost data, a formula or a machine. To qualify for trade secret protection, your business information must meet two requirements.

First, you must show that you've taken steps to keep the information secret—for example, by:

- keeping it in a secure place such as a locked cabinet
- giving employees access to it on a need to know basis
- informing employees that the information is proprietary, and
- having employees acknowledge in writing that the information is a trade secret.

Example: Sue works at Speedy Copy Shop. She has daily access to the list of larger accounts that are regularly billed more than \$2,000 per month. Sue quits to open her own competing shop. Before she does, she copies the list of major accounts. One of her first steps in getting her new business going is to try to get their business away from her former employer. Speedy sues Sue for infringing on its trade secret. At trial, Speedy shows that it keeps the list in a secure place, permits access only to selected employees who need the information and has all employees sign nondisclosure agreements. In light of these precautions, the judge orders Sue not to contact the customers on the list and requires her to compensate Speedy for any profits she has already earned on those accounts.

Second, the information must not be freely available from other sources. If the recipe for a restaurant's award-winning custard tart can be found in a standard American cookbook or recreated by a competent chef, it simply isn't a trade secret. On the other hand, if the restaurant's chef found the recipe in a medieval French cookbook in a provincial museum, translated it and figured out how to adapt it to currently available ingredients, it probably would be considered obscure enough to receive trade secret protection. That's because the recipe isn't readily available to other American restaurants.

In addition to the requirements that a trade secret must be guarded information that is somewhat obscure, judges sometimes look at how valuable the information is to you and your competitors and how much money and effort you spent in developing the trade secret.

b. Covenants not to compete

To prevent an employee from competing with you after leaving your workplace, consider having him or her sign a covenant not to compete. In a typical covenant, the employee agrees not to become an owner or employee of a business that competes with yours for a specific time and in a specific location.

The best time to secure a covenant not to compete is when you hire an employee. An employee who is already on the payroll may be more reluctant to sign anything—and you'll have less leverage to negotiate the agreement.

Battles over the legality of these agreements must usually be resolved in court. Judges are reluctant to deprive people of their rights to earn a living, so the key to a legally enforceable covenant not to compete is to make its terms reasonable. In evaluating whether a covenant not to compete is reasonable, focus on three questions—each of which relates to the specific job and the specific employee.

- Is there a legitimate business reason for restricting the future activities of the particular employee? There probably is if you expect to spend significant time and money in training a high-level employee and plan to entrust him or her with sensitive contacts on lucrative accounts. Such an employee could easily—and unfairly—hurt your business by competing with you. This would motivate a judge to find that you have a legitimate business reason for the covenant. On the other hand, if you require a new receptionist or typist to sign a similar covenant, a judge would probably find that you have no valid business purpose for restricting the employee's ability to work elsewhere.
- Is the covenant reasonably limited in time? A one-year limitation may be reasonable for a particular employee. A three-year limit might not be.
- Is the covenant reasonably limited as to geographical scope? A 50-mile limit may be reasonable for a particular employee. A limit spanning several states might not be deemed reasonable.

Example: When Mary hires Sid to be the office manager for her profitable travel agency, she realizes that Sid will have access to major corporate accounts and daily contact with the corporate managers who make travel arrangements. Mary also knows that she'll spend considerable time in training Sid and invest more than \$4,000 in specialized seminars that she will require Sid to attend. She has Sid sign a covenant not to compete in which Sid promises that while working for Mary and for two years afterwards, he won't work for or own a travel agency within 50 miles of Mary's agency. After six months, Sid quits and starts a competing agency one mile from Mary's. The judge enforces the covenant not to compete by issuing an injunction forbidding Sid from operating his new business and by awarding damages to Mary as well.

6. Hiring Young Workers

There are federal and state laws that restrict your right to hire workers who are under 18 years old. These laws limit the type of work for which young people may be hired and the hours they may work.

7. Hiring Immigrants

Federal law prohibits hiring undocumented aliens. You and each new employee are required to complete INS Form I-9, Employment Eligibility Verification.

INDEPENDENT CONTRACTORS - BEWARE OF LABELS:

The IRS believes that many small businesses are labeling some workers as independent contractors instead of employees to avoid withholding payroll taxes—and that the agency is collecting less money than it's entitled to. Acting on this belief, the IRS is vigorously investigating and challenging how businesses classify workers.

Excerpted from the "*The Employer's Legal Handbook*", by Fred S. Steingold

Chapter 2 – Personnel Practices

You can avoid most legal problems in the workplace if you respect employees and treat them well. But no matter how caring you are, there will still be misunderstandings you'll be called upon to handle. Fortunately, the vast majority of job disputes can be resolved within the workplace if you listen patiently to what employees have to say and are prepared to make adjustments when legitimate complaints surface.

However, even though you treat workers fairly, there's always a chance a dispute will get out of hand and that an employee will sue your business for some perceived abuse of his or her rights. Or an unhappy employee may file a complaint with a government agency alleging that you violated a statute or an administrative regulation. If that happens, you'll have to prove to a judge, jury, arbitrator or investigator that you met your legal obligations to the employee. That can be harder than you think. Key paperwork may have been lost—or never prepared in the first place. And witnesses may have forgotten what happened or have moved on and not be locatable.

To maintain a solid legal footing, establish good written policies and then maintain a paper trail indicating how they are implemented. Written policies will help you if you have to defend yourself in a legal proceeding—and, equally important, can nip misunderstandings in the bud before they turn into pitched legal battles. They provide a cogent point of reference when you discuss problems with an employee, increasing the likelihood of reaching an amicable resolution.

The first step for most workplaces is to create an employee handbook that clearly explains company policies and employee rights and benefits. Follow up by keeping records of key employee contacts, including periodic evaluations of how employees are performing their jobs.

Actions Speak Loudly, Too. *You must start with sensible and fair policies and apply them with an even hand to all employees. A carefully developed paper trail is important, but if you've violated an employee's rights, the mere fact that you've created good paperwork won't normally shield you from the legal consequences.*

Copyright © 1999-2001 Nolo.com All Rights Reserved

A. Employee Files

Create a file for each employee in which you keep all job-related information, including:

- Job description
- Job application
- Offer of employment
- INS Form I-9 and supporting documents
- IRS Form W-4
- Receipt for employee handbook
- Periodic performance evaluations
- Sign-up forms for employee benefits
- Complaints from customers and co-workers
- Awards or citations for excellent performance
- Warnings and disciplinary actions, and
- Notes on an employee's attendance or tardiness.

Employee files can be a two-edged sword. They can provide valuable documentation to support a firing, demotion or other action that's adverse to the employee—but the employee, in turn, can point to indiscreet entries and use them against you. It would be a mistake, for example, to include unsubstantiated criticism of an employee in the file or comments about the employee that are unrelated to job performance and qualifications.

1. Correcting Mistakes

To err is human. To leave an error uncorrected is dumb. It can lead people to conclude that you're callous or unfair or both—not a good impression to leave on those empowered to levy a damage award or penalties against you. And to knowingly keep false information on hand increases the risk of a libel case being brought against you.

Example: Joe doesn't show up for work a week after his paid vacation has ended. You put a note in his file documenting this fact. Then you learn that on the last day of his vacation he was in a serious car accident and wound up in intensive care. Put these additional facts in Joe's file. If you don't, Joe will have good reason to be angry with you, and other people who later look at the file won't put much stock in anything else they find there.

2. Confidentiality

Keep employee files locked up. Make them available only to people in your company who have a legitimate business need to have access to the files—managers, for example, who must make decisions about promotions and discipline. Inform company personnel that the information in the files must remain confidential. While an employee or former employee may have a legal right to see his or her file, no one else does unless they have a subpoena.

3. Medical Information

Special guidelines apply to medical information gathered in the workplace. The Americans With Disabilities Act (ADA) imposes very strict limitations on how you must handle information obtained from postoffer medical examinations and inquiries. You must keep the information in medical files separate from nonmedical records, and you must store the medical files in a separate locked cabinet. To further guarantee the confidentiality of medical files, designate a specific person to have access to those files.

The ADA allows very limited disclosure of medical information. Under the ADA, you may:

- inform supervisors about necessary restrictions on an employee's duties and about necessary accommodations
- inform first aid and safety workers about a disability that may require emergency treatment and about specific procedures that are needed if the workplace must be evacuated, and
- provide medical information required by government officials and by insurance companies that require a medical exam for health or life insurance.

Otherwise, don't disclose medical information about employees. Although the confidentiality provisions of the ADA protect only some disabled workers, the best policy is to treat all medical information about all employees as confidential.

4. Access by Employees

Many states have laws giving employees—and former employees—access to their own personnel files. How much access varies from state to state. Typically, if your state allows employees to see their files, you can insist that you or another supervisor be present to make sure nothing is taken, added or changed. Some state laws allow employees to obtain copies of items in their files, but not necessarily all items. A state law, for example, may limit the employee to copies of documents that he or she has signed, such as a job application. If an employee is entitled to a copy of an item in the file or if you're inclined to let the employee have a copy of any document in the file, you—rather than the employee—should make the copy.

Usually, you won't have to let the employee see sensitive items such as information assembled for a criminal investigation, reference letters and information that might violate the privacy of other people. In a few states, employees may insert rebuttals of information in their personnel files with which they disagree.

5. Informing Employees

Generally, the law doesn't require you to voluntarily tell employees what's in their employee files. You need only disclose information when an employee makes an appropriate request under an employee access law. About the only exception is that laws in some states require you to tell employees if you're taking adverse action against them because of information in a consumer credit report.

Still, it may be good practice to keep employees informed about what's going into their files. Otherwise, borderline employees may think they're doing fine and be justifiably surprised by a disciplinary action or firing. Admittedly, some employees can get demoralized if they're overwhelmed with negative information about their work, so some discretion is necessary in giving them feedback. But basically, letting employees know where they stand prevents surprises and can lead to improved performance. And if the employee doesn't shape up and winds up being fired, anyone reviewing the facts—a judge or jury, for example—will be more likely to side with you if you've given the employee fair warning about what was wrong.

Copyright © 1999-2001 Nolo.com All Rights Reserved

B. Employee Performance Reviews

Most large companies review and evaluate their employees periodically. This is a sound management

practice and one which even small companies should consider—especially for new employees.

1. BENEFITS OF EVALUATIONS

Evaluating employees periodically gives them a chance to improve if they're not performing well. If you later find it necessary to discipline or fire an employee, it won't come as a surprise to the employee.

By putting your evaluations in writing and saving them in the employee's file, you normally have a credible history of documented problems you can use if an employee claims that he or she was fired for an illegal reason. Legally, you don't have to have a good reason or any reason to fire an at will employee, and you don't have to give notice in advance or afford the employee a chance to improve. However, an employee who is fired may claim, for example, that the firing was based on illegal discrimination, so it's not wise to rely solely on your legal right to fire an employee.

You want to stand ready to rebut any possible claim that you fired an employee for an illegal reason such as discrimination based on race or sex. The best way to do this is to preserve in written evaluations and other documents the good reasons you relied on to fire the employee.

Example: Charlotte works at the counter of Parts Plus, a retailer of auto parts. Parts Plus fires Charlotte after she's been there for 18 months. Charlotte sues, claiming that Parts Plus fired her in retaliation for complaining to a state agency about photos of nude women that were posted in the back room where she had to go to retrieve auto parts for customers. At trial, Parts Plus produces copies of written evaluations from Charlotte's file.

Eight months before the firing, Charlotte's supervisor had written: "You must become more familiar with our inventory of parts for imported cars. Also, you need to make fewer errors on the computer system."

Two months before the firing, the supervisor had written: "You're still having problems with imports. We will arrange for you to attend a computer training seminar at the community college at company expense, but you must improve your performance."

Company records separately show that Charlotte attended only one of the six training sessions and that two days before the firing, she mixed up orders for three good customers. The upshot: Because of its thorough documentation of Charlotte's ongoing problems, the judge dismisses Charlotte's case against Parts Plus.

Evaluations have two common purposes—to help employees improve their performances and to protect employers from false claims by former employees. To achieve both ends, thoroughly and objectively evaluate each employee at least twice a year—and more often if an employee is experiencing serious problems. Take the evaluation process seriously and do a careful, conscientious job. In some states, employees have successfully sued employers who used poor evaluation procedures for "negligent evaluation"—the failure of the employer to review employees' work fully and honestly and to warn employees that they faced discipline or discharge if they failed to improve.

2. The Evaluation Process

To keep the evaluation process as consistent and objective as possible, devise an evaluation form that you can use with all employees in the same job category. The form should focus on how well the employee has performed the various duties of the job.

Fill in the form before you meet with the employee. Consider these guidelines.

- Give a balanced picture of the employee's strengths and weaknesses.
- Use specific examples of where the employee has met expectations or has exceeded or fallen short of expectations.
- Let the employee know the areas in which he or she must improve. Set objective goals for the employee to meet.
- Where an employee's performance is substantially below par, set a date to meet again with the employee to review his or her progress.
- If the employee's failure to improve may lead to disciplinary measures or discharge, state this clearly in the evaluation.

Leave space on the form for the employee to comment on the evaluation and to acknowledge receiving a copy of it.

Once you've completed the written evaluation, meet with the employee to go over it and to make sure the employee understands it. If you cringe at confronting an employee with criticism, try the sandwich approach: say something positive, something negative, then something positive.

Remember, too, that employees will find it easier to accept criticism—and try to improve their behavior—if you focus on workplace performance and not on the employee's personality. The overall tone of the evaluation should, of course, be as positive as possible because you want the employee to feel motivated rather than resentful.

Whatever your approach, you must tell it like it is. Should you later have legal trouble initiated by a fired employee, a judge or jury won't look at your evaluations in a vacuum. For example, they'll sense that something is wrong if you consistently rate a worker's performance as poor or mediocre—but continue to hand out generous raises or perhaps even promote the person. The logical conclusion: You didn't take seriously the criticisms in your evaluation report, so you shouldn't expect the employee to take them seriously, either.

Just as damaging is to give an employee glowing praise in report after report—perhaps to make the employee feel good—and then to fire the employee for a single infraction. That strikes most people as unfair. And unfair employers often lose court fights, especially in situations where a sympathetic employee appears to have been treated harshly.

If your system is working, employees with excellent evaluations should not need to be fired for poor performance. And employees with poor performance shouldn't be getting big raises.

Once Is Not Enough. *Feedback should be an ongoing process. The written evaluation should be a culmination of the feedback you've given throughout the year. Your goal is to have no surprises about how an employee is doing. It's perfectly appropriate, too, to give an employee a written warning between evaluations if the employee is in jeopardy of being disciplined or fired. A copy, of course, should go in the employee's file.*

Some employers encourage employees to give their own evaluation of how they're doing—and may also ask employees to rate their supervisors. You'll benefit by making the evaluation process a two-way street. Listen carefully to what the employees say. You'll likely learn a thing or two.

DEVELOPING AN EMAIL POLICY:

If you provide employees with computers that allow for electronic mail, or email communication, it's smart to develop a written policy so everyone knows the rules. For one thing, you may be assuming that you have the right to see all email messages sent on your equipment, while employees may be assuming they have a degree of privacy. For another thing, you may be assuming that employees are to use your email system only for company purposes, while employees may be assuming they can use it for unlimited personal purposes as well.

You're the sole judge of what to put into your email policy. The important thing is to make the rules clear so that employees can't create legal problems for you by claiming they were taken by surprise. Email, of course, is a relatively new means of communication, so the workplace norms are just starting to emerge. Here are some statements to consider when you develop an email policy:

- *Our computers and email system are intended to facilitate business communications.*
- *Our management has access at all times to email communications sent or received on our computers and email system.*
- *All communications sent or received on our computers or email system are the property of our company.*
- *Employee privacy doesn't extend to such communications—whether intended for business or personal purposes.*
- *Employees must provide our management with all passwords and encryption keys.*
- *Employees may not use our computers or email system for commercial purposes unrelated to our company, or for sending offensive, harassing or defamatory messages.*
- *Employees who violate these policies may be subject to disciplinary action and may be discharged.*

Copyright © 1999-2001 Nolo.com All Rights Reserved

Excerpted from the "*The Employer's Legal Handbook*", by Fred S. Steingold

Chapter 3 – Wages & Hours

A slew of statutes—federal and state—regulate workplace wages and hours, imposing strict requirements on employers. These laws require, for example, that you:

- pay an employee at least the minimum hourly wage unless he or she is exempt from wage-and-hour statutes
- pay a premium rate for overtime work
- pay for all the time an employee works
- pay men and women equally for the same work
- follow special rules if you employ young workers, and
- observe legal limits on payroll deductions.

For the most part, complying with wage-and-hour laws is simple and routine: You calculate wages using easy to understand formulas and you retain time and payment records for employees. There are, however, some legal subtleties that can affect your ability to carry out your aims. So in addition to discussing the wage-and-hour basics, this chapter covers potential problem areas.

Check State Laws, Too: *This chapter focuses primarily on the federal wage-and-hour laws. Always keep in mind that you may be covered by a state law as well, and that the state law may be more stringent than the federal law. In that case, you must comply with the more stringent state law requirements. For details consult your state labor department.*

Copyright © 1999-2001 Nolo.com All Rights Reserved

A. The Fair Labor Standards Act: Coverage

The main law affecting workers' pay is the federal Fair Labor Standards Act or FLSA (29 U.S.C. §§201 and following) which Congress passed in 1938.

1. Covered Businesses

Your business is covered by the FLSA if you have \$500,000 or more in total annual sales. If your business earns less than \$500,000 in sales, individual employees may come under the FLSA if their work involves interstate commerce. This includes almost every employee, because courts have interpreted the term "interstate commerce" broadly. An employee of a smaller business is covered by the FLSA if, for example, he or she:

- sends mail to or receives mail from other states
- makes phone calls to or receives them from other states
- keeps records of interstate transactions
- handles goods moving in interstate commerce
- crosses state lines as part of the job, or
- does clerical, custodial or maintenance work for a business engaged in interstate commerce or that makes goods in interstate commerce.

It's possible—but highly unlikely—that your business will fall within a handful of specific exemptions to the FLSA. For example, most small farms are exempt. For specific details on what businesses are exempt, check with the nearest office of the U.S. Labor Department's Wage and Hour Division.

If you want to research the exemptions to FLSA coverage, you'll find most of them in 29 U.S.C. §213. Look in an annotated edition of the United States Code, which is what your local library is most likely to have. The annotated edition contains summaries of court decisions that will help you understand the courts' rulings about this complex law. In addition, see Title 29 of the Code of Federal Regulations, which goes into great detail on virtually every aspect of the FLSA—but be forewarned that the details can be mind-numbing to the point of incomprehensibility. Fortunately, the Department of Labor operates an excellent, user-friendly website at <http://www.dol.gov>. There, you can find easy-to-understand articles and guidelines about various federal labor laws that you must follow, including wage-and-hour laws.

INDEPENDENT CONTRACTORS AREN'T COVERED:

The FLSA covers only employees—not independent contractors. Whether a worker is an employee for purposes of the FLSA generally depends on the economic realities and not on the IRS definition of an independent contractor.

To determine whether a worker has sufficient economic independence to qualify as an independent contractor under the FLSA, concentrate on:

- *the degree to which you control the work*
- *the worker's opportunity for profit or loss*
- *the extent of the worker's investment in equipment and facilities*
- *whether the services require a special skill*
- *the permanency of the work relationship between you and the worker, and*
- *whether the worker's service is an integral part of your business.*

2. Exempt Employees

Even though your business is covered by the FLSA, some employees may be exempt from that law's minimum wage and overtime pay requirements. This is a complex area of law and a source of many misunderstandings.

Most employees who are exempt from the minimum wage and overtime pay requirements fall into one of five categories:

- executive employees
- administrative employees
- professional employees
- outside salespeople, and
- people in certain computer-related occupations.

There are a few miscellaneous categories of workers who are exempt as well.

a. Executive, administrative and professional employees

Generally, these are employees who are paid a minimum weekly salary as specified by law and who spend at least 80% of the workday performing duties that require a measure of discretion and independent judgment. Beyond that, each category of worker has special qualifiers.

An executive, for example, is someone who manages two or more employees within a business or a department, and who can hire, fire and promote employees. An administrative employee performs specialized or technical work related to management or general business operations. A professional employee performs original and creative work or work requiring advanced knowledge normally acquired through specialized study.

Be aware, however, that not all of the legal nuances appear in the chart. Unless an employee fits squarely into the simplified guidelines, your best bet is to dig further. Your state labor department can be helpful, as can the nearest office of the U.S. Department of Labor's Wage and Hour Division. (See the Department of Labor's website at <http://www.dol.gov>.)

Note that there's a long test and a short test for each category. If an employee meets the short test, he or she is exempt and need not meet the long test.

The fine points of these exemptions are explained in a free booklet titled Regulations Part 541: Defining the Terms—Executive, Administrative, Professional and Outside Sales. It's available from the nearest office of the Wage and Hour Division of the U.S. Department of Labor.

For a list of Wage and Hour Division offices by state, consult the Department of Labor's website at <http://www.dol.gov/dol/esa/public/contacts/whd/america2.htm>. You can also contact the Department of Labor by phone at 202-693-6450.

The long test requirement that executives and administrators spend at least 80% of the workday in certain activities is reduced to 60% for employees of retail and service establishments. Further, the percentage test doesn't apply at all to an executive who's in charge of an independent business establishment or branch or who owns at least a 20% interest in the business.

Job titles alone don't determine whether someone is an exempt executive, administrative or professional employee. The actual work relationship is what counts. Still, it's possible to make some generalizations about who's exempt and who isn't.

Typical Exempt Jobs

Department Head	Personnel Director
Financial Expert	Executive Assistant
Physician	Lawyer
Credit Manager	Safety Director
Account Executive	Tax Specialist

Typical Nonexempt Jobs

Clerk	Bank Teller
Errand Runner	Newspaper Reporter
Secretary	Bookkeeper
Inspector	Trainee

Mislabeling Can Be Dangerous - Some employers try to avoid the minimum wage and overtime requirements by labeling all entry level employees Assistant Managers—and then requiring them to work well past the 40 hour workweek with no further compensation. The Department of Labor is well aware of such abuses. Employers who mislabel employees to circumvent the law are playing a dangerous game and may wind up paying stiff penalties.

SALARY TRAPS:

One requirement for an executive, administrative or professional exemption is that the employee be salaried. The FLSA treats an employee as salaried only if his or her pay isn't reduced because of variations in the quality or quantity of work performed. If you dock an employee's salary for personal absences of less than a day at a time, the employee may legally be deemed to be an hourly employee—and no longer exempt from the minimum wage and premium overtime requirements. For example, if a salaried employee misses a few hours of work to take care of personal business, don't reduce his or her salary to make up for that time. If you reduce the employee's salary on an hourly basis, the Department of Labor may conclude that employee is really an hourly worker and not eligible for the overtime exemption. The reasoning is that salaried workers often put in many hours of overtime without getting paid for it, so it's unfair to reduce their pay if they miss a few hours now or then.

Also, don't deduct for absences caused by jury duty, appearances in court as a witness or temporary military leave. If an exempt employee misses two or three days for jury duty but works the rest of the week, pay the full salary for that week.

b. Outside salespeople

An outside salesperson is exempt from FLSA coverage if he or she:

- regularly works away from your place of business while making sales or taking orders, and
- spends no more than 20% of worktime doing work other than selling for your business.

Typically, an exempt salesperson will be paid primarily through commissions and will require little or no direct supervision in doing the job.

c. Computer specialists

This exemption applies to computer system analysts, programmers and software engineers who are paid at least \$27.63 an hour.

An employee will likely be exempt from the wage-and-hour laws if his or her primary duties consist of such things as determining functional specifications for hardware and software, designing computer systems to meet user specs and creating or modifying computer programs.

d. Miscellaneous workers

Several other types of workers are exempt from the minimum wage and overtime pay provisions of the FLSA. The most common include:

- employees of seasonal amusement or recreational businesses
- employees of local newspapers having a circulation of less than 4,000
- newspaper delivery workers
- switchboard operators employed by phone companies that have no more than 750 stations, and
- workers on small farms.

e. Apprentices

An apprentice is a worker who's at least 16 years old and who has signed an agreement with you to learn a skilled trade. Apprentices are exempt from the requirements of the FLSA. But beware that your state may have a law limiting the number of hours you can hire someone to work as an apprentice. State law may also require you to pay the apprentice a certain percentage of the minimum wage. Check with your state labor department for more information.

Under the FLSA, you must pay an apprentice a progressively increasing wage that averages at least 50% of the journeyman's rate over the period of the apprenticeship.

THE CONSEQUENCES OF BENDING THE RULES:

The Wage and Hour Division of the U.S. Department of Labor enforces the wage-and-hour requirements of the FLSA. Almost always, it is tipped off to investigate a business by an unhappy employee who has complained. Be aware that it's illegal to fire or discriminate against an employee for filing a complaint or participating in a legal proceeding under the FLSA. And many states have similar laws prohibiting such retaliation.

In theory, you can be fined up to \$10,000 for violating the FLSA—and even spend time in jail for a second offense if it's willful. But fines and jail time are used in only the most blatant cases.

More typically, you'll be required to pay the employee all unpaid wages including overtime pay, and you may be slapped with a modest fine or penalty. The real cost comes in the time and expense of being involved in enforcement proceedings—not to mention the damage to workers' morale and the animosity that can be created in the workplace, particularly if several employees claim their rights were violated.

Copyright © 1999-2001 Nolo.com All Rights Reserved

B. Pay Requirements

The FLSA and many state laws set a minimum wage and require premium pay for overtime work. In addition, the FLSA requires that men and women receive equal pay for equal work.

1. Minimum Wage

If your business is covered by the FLSA, you must pay all covered employees at least the minimum wage—\$5.15 an hour. Federal law allows you to pay a training wage of \$4.25 an hour to employees under 20 years of age during their first 90 days on the job. You're not allowed to displace employees just so you can hire young workers and pay them the training wage.

The law in your state may set a minimum wage higher than the federal rate. In Alaska, for example, the minimum wage must remain 50 cents higher than the federal minimum. In the few states that have a lower minimum, the federal rate controls. Check with your state department of labor for increases that may not be reflected in the chart below. You can check the Updates section on Nolo's website at <http://www.nolo.com>.

POSTER REQUIREMENTS:

Federal law requires you to display the Federal Minimum Wage poster prominently in the workplace. It's available at the nearest office of the U.S. Department of Labor's Wage and Hour Division. Your state labor department may also be able to provide this poster as well as any poster that may be required by

state law.

2. Equal Pay for Equal Work

You must provide equal pay and benefits to men and women who do either the same job or jobs that require equal skill, effort and responsibility. This is required by the Equal Pay Act—an amendment to the FLSA (29 U.S.C. §206). Job titles aren't decisive in assessing whether two jobs are equal; it's the work duties that count. The Act makes it unlawful, for example, for the owner of a hotel to pay its janitors (primarily men) at a different pay rate than its housekeepers (primarily women) if both are doing essentially the same work.

The Equal Pay Act is enforced by the U.S. Equal Employment Opportunities Commission or EEOC.

a. Employees covered

The Equal Pay Act applies to the same employees as those covered by the minimum wage and overtime pay provisions of the FLSA. In addition, the Equal Pay Act applies to executive, administrative and professional employees even though these employees are exempt from the minimum wage and overtime provisions.

The Equal Pay Act doesn't prohibit pay differences based on:

- a seniority system
- a merit system
- a system that pays a worker based on the quantity or quality of what he or she produces, or
- any factor other than the worker's gender—starting salaries, for example, that are based on a worker's experience level.

Example: The Ace Tool and Die Company was founded in 1960. The company initially hired 50 male tool and die makers. Many of those men are still working there. Since 1980, the company has expanded and hired 50 more tool and die makers, half of them male and half female. All of the tool and die makers at Ace are doing equal work, but because the company awards raises systematically based on the length of a worker's employment there, many of the older male workers earn substantially more per hour than their female co-workers who are doing equal work. The pay system at Ace Tool and Die doesn't violate the Equal Pay Act because the pay differences between genders are based on a bona fide seniority system.

It's legal to round off records of an employee's starting time and stopping time—for example, to the nearest five minutes or to the nearest one-tenth or quarter of an hour. But if you follow this procedure, make sure it all averages out so that each employee is fully paid for the time actually worked.

b. Determining job equality

Jobs don't have to be identical for the courts to consider them equal. In general, two jobs are equal for the purposes of the Equal Pay Act when both require the same levels of skill, effort and responsibility—and are performed under similar conditions.

There's room for interpretation, but if there are only small differences in the jobs, they should be regarded as equal.

Example: At a ceramics company, the major difference between the jobs being done by women and men is a weightlifting restriction placed on the women. The women and men are performing equal work because heavy lifting is only a small part of the job. (Schultz v. Saxonburg Ceramics Inc., 314 F. Supp. 1139 (W.D. Pa., 1970).)

3. Paying Overtime

The FLSA requires you to pay nonexempt workers at least one and one-half times their regular rates of pay for all hours worked in excess of 40 in one week. In 1938, when the FLSA was enacted, the nation was just recovering from the Depression. Congress believed that imposing an overtime penalty on employers would induce shorter working hours and help the nation solve its economic problems by spreading work around. The premium overtime rule may have outlived its original purpose—but the law is still on the books, creating headaches for employers.

The FLSA doesn't require you to pay an employee at an overtime rate simply because he or she worked more than eight hours in one day. Generally, you calculate and pay overtime by the week. The workweek may begin on any day of the week and any hour that you, the employer, establish. Generally, in applying the minimum wage and overtime pay rules, each workweek stands alone; you can't average two or more workweeks. And you can't manipulate the start of the workweek merely to avoid paying overtime.

State Law May Be More Stringent - Your state may have a different rule on overtime pay than the FLSA. Remember, when there is a conflict between state and federal law, you must comply with the more stringent requirement. To find out the details of your state law, consult your state labor department.

a. Exempt employees

The employees described in Section A2 as being exempt from some FLSA provisions are also exempt from the overtime pay requirements of the Act. In addition, a number of other employees are exempt.

Transportation workers. Taxicab drivers are exempt from the overtime pay requirements of the FLSA. Drivers and other employees of trucking companies are not covered by the FLSA but are subject to the Interstate Commerce Act, which is administered by the Department of Transportation.

Certain commissioned employees of retail or service establishments. An employee of a retail or service establishment will be exempt from the overtime pay requirements of the FLSA if:

- the employee's regular rate of pay is more than one and one-half times the minimum wage, and
- more than half the employee's pay comes from commissions.

Vehicle salespeople and mechanics. The FLSA exempts from its overtime pay requirements employees who sell cars, trucks, trailers, farm implements, boats or aircraft. Also exempt are parts clerks and mechanics who service cars, trucks or farm implements if they're working for a nonmanufacturing business that sells these items.

Newspeople. Announcers, news editors and chief engineers of certain small radio and TV stations are exempt from the overtime pay requirements.

Employees of motion picture theaters. Employees of movie theaters need not be paid for overtime work at the premium rate.

Farmworkers. Farmworkers need not be paid for overtime work at the premium rate.

b. Partially exempt employees

Special overtime rules apply to some employees.

Employees of hospitals and residential care facilities. Those who have agreements for a 14-day work period must receive overtime premium pay for all hours over eight hours a day or 80 hours in the 14-day work period—whichever amounts to more.

Training time. Employees who lack a high school diploma or who haven't finished eighth grade can be required to spend up to 10 hours a week in reading and basic skills programs. These employees must receive their regular wages for time spent in training, but needn't be paid overtime pay for those hours.

c. Computing overtime pay

The U.S. Department of Labor's Wage and Hours Division offers guidelines on how to compute overtime pay.

Hourly rate. If an employee works more than 40 hours during a week, you must pay at least one and one-half times the regular rate for each hour over 40.

Example: An employee whose regular rate is \$6 an hour works 44 hours in a workweek. You must pay the employee at least \$9 for each hour over 40. Pay for the week would be \$240 for the first 40 hours, plus \$36 for the four hours of overtime—a total of \$276.

Piece rate. To obtain the regular pay rate for an employee who is paid on a piecework basis, divide the total weekly earnings by the total number of hours worked that week. You must pay the employee the full piecework earnings, plus an additional one-half times this regular rate for each hour over 40 that he or she works.

Example: An employee paid on a piecework basis works 45 hours in a week and earns \$315. The regular rate of pay for that week is \$315 divided by 45, or \$7 an hour. In addition to the straight time pay, you must pay the employee \$3.50 (half the regular rate) for each hour over 40.

Another way to pay pieceworkers for overtime is to pay one and one-half times the piece rate for each piece produced during the overtime hours. However, you and the employee must agree to this payment arrangement in advance. The piece rate must be the one actually paid during regular work hours and must be enough to yield at least the minimum wage per hour.

Salary. To obtain the regular rate of pay for an employee paid a salary for a regular or specified number of hours a week, divide the salary by the number of hours for which the salary is intended as compensation. You and the employee may have agreed to a salary that meets the minimum wage requirement that you pay for whatever number of hours are worked each week. Here, to obtain the regular rate, divide the salary by the number of hours worked. Both the regular rate and the overtime rate will vary, depending on how many hours are worked each week.

Example: You've agreed to pay an employee a salary of \$300 a week. If the employee works 50 hours, the regular rate is \$6 (\$300 divided by 50 hours). So in addition to the salary, you must pay \$3 (half the regular rate) for each of the 10 overtime hours—a total of \$330 for the week. If the employee works 60 hours, the regular rate will be \$5 (\$300 divided by 60 hours). In that case, you'll owe an additional \$2.50 for each of the 20 overtime hours—a total of \$350 for the week.

In no case can the regular rate be less than the minimum wage required by the FLSA.

If a salary isn't paid weekly, you must determine the weekly pay to compute the regular rate and overtime. If, for example, the salary is paid twice a month, multiply by 24 and then divide by 52 weeks to get the weekly equivalent.

ATTITUDES ON OVERTIME ARE CHANGING

In the recent past, most workers loved overtime work. It represented an opportunity to get ahead financially—maybe a chance to buy a boat or start a college fund for the kids.

Many workers still feel that way, but others don't feel driven to amass as much money as possible from their work. Those who aren't thrilled by overtime work may have family responsibilities or may simply place a high value on their private time.

The law allows you to schedule overtime for workers, but it may be a more sound management practice to give them some choice in the matter. Otherwise, the workers who don't relish overtime work may feel abused and will drag down morale in the workplace. If you anticipate that you'll be requiring overtime work for certain positions, put that fact in the job description so workers are aware of that likelihood right from the start. Applicants who abhor overtime work can decide to seek work elsewhere.

4. Compensatory Time

The practice of granting hour-for-hour compensatory time—for example, giving a worker six hours time off one week as compensation for six hours of overtime worked the previous week—isn't usually allowed for private sector employees covered by the FLSA. The rule is different for public employees. Employers and employees are often puzzled when they learn that comp time isn't permitted in the private sector because it seems like a sensible and mutually beneficial way to handle overtime in many situations.

You do, however, have a few options for avoiding premium overtime pay by giving a worker time off instead of money. One way is to rearrange an employee's work schedule during a workweek.

Example: Susan, a paralegal at the law firm of Smith and Jones, normally works an eight-hour day, Monday through Friday. One week, Susan and the lawyers need to meet a deadline on a brief due in the court of appeals. So that week, Susan works 10 hours a day, Monday through Thursday. The law firm gives Susan Friday off and pays her for a 40-hour week at her regular rate of pay. This is legal because Susan hasn't worked any overtime as defined by the FLSA; only the hours over 40 hours a week count as overtime hours.

If an employee works more than 40 hours in one week, it's sometimes possible to reduce the worker's hours in another week so that the amount of the employee's paycheck remains constant. This is legal if:

- the time off is given within the same pay period as the overtime work, and

- the employee is given an hour and one-half of time off for each hour of overtime worked.

Example: Frames and Things, a shop that specializes in framing paintings, employs Jared and pays him \$560 at the close of each two-week pay period. Because a week-long street art fair is expected to generate a great demand for framing services, the shop's owner wants Jared to work longer hours that week. However, the owner doesn't want to increase Jared's paycheck. She asks Jared to work 50 hours during art fair week and gives him 15 hours off the next week. Since Jared is paid every two weeks, Frames and Things may properly reduce Jared's hours the second week to keep his paycheck at the \$560 level.

Since state regulations may further restrict the use of comp time, check with your state's labor department. If you allow employees to take comp time, put your policy in writing in the employee handbook so that everyone knows what to expect.

Private Deals Can Be Risky

It's unlikely that a federal or state labor investigator will look into your comp time arrangements unless an employee files a complaint. Knowing this, you may be tempted to work out comp time deals with employees to meet your needs and theirs. This can be dangerous. You never know when a friendly, loyal employee may turn sour and look for some legal technicalities to use against you.

Relief May Be on the Way

Because employers and employees alike feel that the current rules on comp time are too rigid, Congress is working on changes. One plan being considered would allow you to offer employees a choice between receiving overtime pay or one and one-half hours of comp time for each hour of overtime worked.

Copyright © 1999-2001 Nolo.com All Rights Reserved

C. Payroll Withholding

Federal law requires you to withhold income taxes and Social Security and Medicare contributions from employees' paychecks. States and municipalities that have income taxes also require withholding—usually under a system that parallels the federal procedures.

You may also deduct the cost of meals, housing and transportation, loans, debts owed to you, child support and alimony, payroll savings and insurance premiums. There are exceptions to these rules, and limits on how much you can withhold or deduct.

1. Meals, Housing and Transportation

You may legally deduct from an employee's paycheck the reasonable cost or fair value of meals, housing, fuel and transportation to and from work. But you must show that you customarily paid these expenses and that:

- they were for the employee's benefit
- you told the employee in advance about the deductions from a paycheck, and
- the employee voluntarily accepted the meals and other accommodations against minimum wage.

2. Debts Owed to an Employer

If you loan money or extend credit to an employee, you can withhold money from his or her pay to satisfy that debt. However, it's illegal to make such a deduction if it would drop the employee's pay below the minimum wage.

Example: Roadmaster Auto Parts Store hires Bruce at \$6.15 an hour to make deliveries. One morning, the battery in Bruce's car dies. Roadmaster allows him to replace the battery with a new one from the store's stock—and Bruce agrees that Roadmaster can deduct the price, \$80, from his paycheck. Under the FLSA, Roadmaster can legally deduct no more than \$40 per week (40 hours X \$1) from Bruce's gross pay to cover the battery. To deduct more would drop Bruce's pay rate of \$6.15 per hour to below the

required minimum of \$5.15.

3. Debts and Wage Garnishments

You may be sent an order from a judge requiring your business to withhold money from an employee's paycheck to satisfy a debt the employee owes to someone else. This order is part of a legal process called wage attachment or wage garnishment. Usually, a judge will issue such an order only after a judgment has been signed stating that the employee actually owes the money—but such a judgment may not be necessary for garnishments based on an employee's failure to pay student loans, child support, alimony or taxes.

If you receive a garnishment order, read it carefully because it will specify deadlines you must meet for processing the order. You may have to pay a penalty if you don't comply with the terms and timetables of the garnishment. Procedures vary from state to state, but most likely you'll be required to file a form with the court disclosing how much you owe to the employee for wages. Then you'll be required to send a portion of those wages to the court or, perhaps, to the creditor or creditor's lawyer.

A federal law, the Consumer Credit Protection Act (15 U.S.C. §1673), prohibits a judgment creditor from taking more than 25% of an employee's net earnings through a wage garnishment. A few states offer greater protection to the employee. In Delaware, for example, a judgment creditor can't take more than 15% of an employee's wages. Usually the papers you receive as part of the garnishment order will explain how much of the employee's wage you should deduct and where to send the money.

The Consumer Credit Protection Act also prohibits you from firing an employee because of a garnishment order to satisfy a single debt. But if two judgment creditors garnish an employee's wages or one judgment creditor garnishes an employee's wages to pay two different judgments, you're free to fire that employee. Again, some state laws place stricter limits on your right to fire an employee because of garnishments. In Washington, for example, you can't fire a worker for judgments owed unless his or her wages are garnished by three different creditors or to satisfy three different garnishments within a year. In Connecticut, you can't fire a worker unless you've had to deal with more than seven creditors or judgments in a single year.

Although statutes limit your right to fire employees because of garnishments, you can still fire such employees for cause—or even without cause, if you can establish that the firing wasn't based on the garnishments.

4. Child Support

The federal Family Support Act of 1988 (102 U.S.C. §2343) requires that new or modified child support orders include an automatic wage withholding order. If you receive a copy of such an order, you must withhold a portion of the employee's pay and send it on to the parent who has custody of the child.

You can't discipline, fire or refuse to hire someone just because his or her pay is subject to a child support wage withholding order.

5. Back Taxes

If an employee owes taxes to the federal government and doesn't pay, the IRS can grab most—but not all—of the employee's wages. The amount the employee gets to keep is determined by the number of his or her dependents and the size of the standard deduction to which the employee is entitled.

If you receive a wage levy notice from the IRS, don't ignore it. If you go ahead and pay the employee in full, you'll be liable to the IRS for whatever amount you wrongly pay. Most state and some municipal taxing authorities have similar power to seize a portion of an employee's wages.

Copyright © 1999-2001 Nolo.com All Rights Reserved

Excerpted from the *"The Employer's Legal Handbook"*, by Fred S. Steingold

Chapter 4 – Employee Benefits

Employee benefits are such a common part of the workplace terrain today that many assume these benefits are required by law. But generally, the decision about whether or not to provide such benefits is up to you.

Even though providing benefits is largely optional, enlightened employers generally do offer some type of benefit package. Offering benefits can reflect your commitment to keeping a satisfied workforce and can help you remain competitive in attracting competent workers.

Because the federal tax laws allow an employer to deduct the cost of many employee benefits as a business expense, the financial burden of providing these benefits is greatly reduced. Benefits that qualify for favorable tax treatment include health and dental coverage, term life insurance, disability insurance, approved pension plans, educational assistance programs and dependent care assistance. But if a benefit plan is rigged to favor the owners of a business or employees who receive the highest compensation, the plan may not qualify for a tax deduction.

If you opt to provide healthcare coverage or pension plans, federal laws may impose requirements on these plans.

EMPLOYEES CAN HELP YOU PLAN

In putting together a benefit program, consider taking a survey of employees or setting up a committee of several of them to recommend the benefits they'd most like to have. Then, after exploring the options and deciding on the benefits you'll offer, communicate that decision—and your reasons for the choice—to the employees.

Perhaps some employee suggestions will be too expensive or even impossible to adopt. Others may be left to reconsider in a year. Whatever the situation, when employees go to the trouble of making suggestions, they need to know that their suggestions are taken seriously.

Copyright © 1999-2001 Nolo.com All Rights Reserved

A. Healthcare Coverage

Healthcare coverage is the benefit most employees covet. Medical treatment is expensive today and it's difficult for an individual seeking coverage to find some that's affordable. Of course, employees enjoy the greatest benefits if the employer foots the entire bill. But even if an employer pays none of the cost of coverage—or just a part of it—the employee benefits by being able to participate at relatively low group rates.

Providing healthcare coverage is optional for employers. Hawaii is the sole exception. Its Prepaid Healthcare Act (§393-1 and following of the Hawaii Statutes) requires employers to provide coverage to every employee who earns a monthly wage of at least 86.67 times that state's minimum wage—\$5.25 an hour.

1. Types of Coverage

Traditionally, employers who have provided healthcare coverage have done so through an indemnity or reimbursement plan which pays the doctor or hospital directly, or reimburses the employee for medical expenses he or she has already paid. Blue Cross/Blue Shield is a traditional type of plan.

While traditional coverage allowing employees to seek out their preferred medical provider is still widely used, a growing number of employers today provide coverage through the alternatives of a health maintenance organization (HMO) or a preferred provider organization (PPO).

An HMO is comprised of hospitals and doctors who provide specified medical services to employees for a fixed monthly fee. Within the HMO service area, covered employees must use the HMO hospitals and doctors unless it's an emergency or they receive permission to go elsewhere.

A PPO is a network of hospitals and doctors who agree to provide medical care for specified fees. Often the network is put together by an insurance company that also administers it. Employees usually can choose between using the network's hospitals and doctors or going elsewhere.

2. Making the Best Choice

If you choose to provide health insurance coverage to employees, explore all the alternatives: group health insurance policies, HMOs and PPOs. Until you compare, you won't know which arrangement will be least costly to both your business and the employee.

Under some plans, employees pay for a portion of their medical expenses—usually called copayments. The theory is that employees will seek only essential treatment if they're paying some of the cost.

Your business must decide on who will pay the monthly, quarterly or semi-annual premium for healthcare coverage. Among the choices for who pays the tab:

- Your business can pick up the full amount.
- You can split the cost of premiums with the employee—perhaps paying 80% and having the employee pick up the other 20% through a paycheck deduction.
- You can pay in full for the employee's coverage, but require the employee to pay the extra cost of covering his or her dependents.
- You can require the employee to pay the entire charge—although that won't be perceived as much of a benefit by the employee even though the group plan will undoubtedly be cheaper than individual coverage.

Another way to shift some costs to the employee is through a deductible plan which requires the employee to pay a specified amount of medical bills each year—\$500, for example—before the plan's coverage kicks in.

Consider Flexible Coverage Arrangements

Depending on where your business is located and the number of employees in it, you may be able to offer several different choices of coverage to employees. For example, some employers opt to pay 100% of coverage under an HMO. If their particular HMO doesn't require all employees to join, some employers allow those employees who wish to do so to buy their own coverage. Then the employers reimburse them at the HMO rate. Depending on the required copayments, deductibles and other plan features, employees who select a different plan may pay a bit more or less than the HMO rate.

You should decide, too, whether to cover employees who work part time. You might, for example, provide full benefits for those who work 30 hours or more per week, and prorated benefits for those who work at least 20 hours but less than 30. Such an approach may help you qualify for cheaper group rates.

Children May Have Rights, Too

If you have a group healthcare plan, a child of a divorced employee may have a right to coverage—even if the child doesn't live with the employee or isn't a financial dependent of the employee. An employee's child will be covered if a domestic relations settlement agreement or a court order requires such healthcare coverage and contains specific information required by ERISA. If you receive a copy of such a settlement agreement or court order and are unsure about what to do, check with the plan administrator or an employee benefits lawyer.

3. Coverage Limitations

The Americans With Disabilities Act (ADA) is designed to eliminate workplace discrimination against people with disabilities. The ADA doesn't require you to offer healthcare benefits to employees, but it does require you to give people with disabilities the same healthcare benefits you offer to others. If your business is covered by the ADA, you may not deny insurance coverage or limit benefits based on a worker's disability.

Your plan will usually violate the ADA if it excludes specific disabilities, such as deafness, AIDS or schizophrenia. Similarly, it's generally illegal to exclude groups of disabilities—for example, cancers, muscular dystrophy and kidney diseases—or to exclude all conditions that substantially limit a major life activity.

Some insurance restrictions that may at first seem to discriminate against disabled workers are allowed under the ADA.

a. Physical condition restrictions

Healthcare plans often provide more liberal benefits for treating physical conditions than for treating mental and nervous conditions. Similarly, some plans provide fewer benefits for eyecare than for other physical conditions. These broad distinctions are allowed by the ADA. They may have greater impact on some people with disabilities, but they're not intentionally discriminatory.

b. Preexisting conditions

There are limits on your ability to offer a healthcare plan that doesn't cover preexisting conditions. A healthcare plan will violate the ADA if it excludes specific preexisting conditions such as blood disorders. In EEOC parlance, such exclusions are "disability based" and therefore not permissible.

A health insurance portability law—in effect since mid-1997—further limits your right to exclude preexisting conditions in any healthcare plan that you provide to employees. That law provides that any exclusion for a preexisting condition:

- must relate to a condition for which the employee received medical advice or treatment during the six months before the employee's enrollment date
- cannot last for more than 12 months—18 months for late enrollees—after the employee's enrollment date, and
- cannot include pregnancy.

c. Treatment restrictions

A plan that doesn't cover experimental drugs or treatment or that excludes elective surgery doesn't violate the ADA. Similarly, it's not a violation to put a monetary cap on certain types of treatment—for example, to limit payments for X-rays or blood transfusions—even though such a cap may adversely affect people with certain disabilities.

The U.S. Equal Employment Opportunities Commission (EEOC)—the agency that enforces the ADA—has issued guidelines to help employers determine if a healthcare plan meets the ADA requirements. To order the Interim Enforcement Guidance on the Application of the ADA to Disability Based Provisions of Employer Provided Health Insurance, call the commission's publications ordering office at 800-669-3362.

DISCRIMINATION IN GROUP HEALTH PLANS

Under federal law, a group health plan can't discriminate in eligibility for coverage or premiums based on an employee's:

- *health status*
- *medical condition*
- *claims experience*
- *medical history*
- *genetic information*
- *evidence of insurability, or*
- *disability.*

This list applies to the employee's dependents as well. But the law doesn't require a group plan to cover any given procedure—and a group plan may limit the level of benefits it provides, as long as the plan doesn't discriminate among similarly situated employees.

4. Continuing Coverage for Former Employees

A federal law called the Consolidated Omnibus Budget Reconciliation Act or COBRA (29 U.S.C. §1162) applies to your business if you have 20 or more employees and you offer a group healthcare plan. If COBRA applies to your business, you must offer employees and former employees the option of continuing their healthcare coverage if their coverage is lost or reduced because:

- their employment has been terminated for any reason—except gross misconduct
- their hours have been reduced, or
- they've become eligible for Medicare.

Members of the employee's family must also be given the opportunity to continue their coverage. The chart below depicts the circumstances—qualifying events—that trigger an employer's obligation to allow continuing healthcare coverage under a group plan. COBRA gives rights to different people, depending on the qualifying event. How long the benefits must be continued is determined by the qualifying event and whether the covered employee is disabled.

CONTINUING COVERAGE FOR FORMER EMPLOYEES

<u>Qualifying Event</u>	<u>People Entitled to Continue Coverage</u>	<u>How Long</u>
The employee quits or retires	Employee, spouse, dependents	18 months;

worker		29 months for disabled
You fire or lay off the employee for reasons other than gross misconduct	Employee, spouse, dependents	18 months; 29 months for disabled
You reduce the employee's hours so he or she loses coverage	Employee, spouse, dependents	18 months; 29 months for disabled
worker		
The employee dies	Surviving spouse, dependents	36 months
The employee divorces or becomes legally separated	Former spouse, dependents	36 months
The employee goes on Medicare	Spouse, dependents	36 months
A dependent loses coverage through marriage or age	Dependent	36 months

The employee must pay for continuing coverage under COBRA, including both your share and the employee's share. You can charge 102% of the premium cost—using the extra 2% to cover administrative costs. The cost to the employee or the employee's family for continuing coverage must be similar to the cost of covering people still on your payroll.

COBRA covers HMO and PPO plans in addition to traditional group insurance plans. COBRA also covers all other types of medical benefits, including dental and vision care and plans under which an employer reimburses employees for medical expenses.

If your business is covered by COBRA and has a group healthcare plan, the plan administrator—the person who handles the plan's paperwork—must give employees and their spouses a written explanation of their COBRA rights when they first become eligible to participate in the plan. A single notice can be sent to an employee and spouse if they live at the same address. Otherwise, the spouse is entitled to a separate notice.

Help Is Available

Small businesses usually find it convenient to let the insurance company serve as the plan administrator and coordinate COBRA notices. The insurance company can provide even more help and information, including a clear explanation of how the plan meets the requirements of COBRA and similar state laws. Any reputable company should be able to provide clear, concise explanatory materials that you can hand out to your employees and, if asked, may send representatives to conduct training seminars and answer employee questions.

When a qualifying event occurs that gives an employee or family member the right to continue coverage, you must notify the plan administrator within 30 days. The plan administrator then has 14 days to notify the beneficiaries of their rights under COBRA. These beneficiaries have 60 days following the notice to let you know if they want to continue their coverage. If so, the employee or eligible family member sends you the premium each month and you send it on to the insurance company. If the beneficiaries don't send the payment when due—or within the grace period—you can cut off coverage.

Several states also have laws giving former employees the right to continue group healthcare insurance coverage after leaving a job. These state laws generally require continuation of healthcare plans that provide benefits through an insurance company such as Blue Cross/Blue Shield. They don't, however, require continuation of a self-insured plan—even one that's administered by a commercial insurance provider. Some of these laws cover smaller employers than COBRA does.

Additional Laws May Apply

If the chart below indicates that your state has no statute, this means there is no law that specifically addresses the issue. However, there may be a state administrative regulation or local ordinance that does control. Contact your state insurance commission

or state labor department for more information.

5. Reducing Costs

Small businesses often feel overwhelmed by the spiraling costs of providing healthcare benefits to employees. But there are some steps you can take that may hold down costs, mostly by eliminating unnecessary medical expenses.

Look for a healthcare plan that practices managed care—requiring participants to get a second opinion before they have surgery or requiring pre-approval by the insurance company for expensive diagnostic procedures.

Requiring employees to pay a part of the monthly coverage fee as well as a portion of each medical bill may encourage employees to be judicious in seeking treatment.

Look into offering coverage through a Health Maintenance Organization (HMO) or Preferred Provider Organization (PPO) instead of traditional insurance or reimbursement coverage. But be sure to shop around to see if the overall cost of a PPO or HMO plan is really lower than traditional coverage.

Money put into preventive care is well spent. You can, for example, call in experts to teach employees the benefits of a healthy diet, exercise and preventive care. Beyond that, you can set a good example by making low-fat food available in your lunchroom and installing exercise equipment in an unused area of the workplace. Also consider paying for seminars to help employees quit smoking and encourage periodic physical checkups—perhaps offering to pay part of the usual deductible payment.

6. Medical Savings Accounts

If you are an employer with 50 or fewer employees, you can offer to your employees the option of opening a medical savings account (MSA). An MSA is a tax-exempt trust or custodial account in which an employee can save money for future medical expenses. The employee uses the account in conjunction with a high deductible health plan to meet his or her health care needs.

This type of account offers employees several benefits, including the following:

- The money in the MSA grows tax-free.
- Employees can claim a tax deduction for the contributions that they make to their MSAs.
- The contributions remain in the employee's MSA until the employee uses them.

Unfortunately, Congress established the MSA program as a pilot program with an expiration date of December 31, 2000. Unless Congress acts to change the law, no new MSAs may be established after this date. As this book went to press, bills to expand and extend the MSA program were pending in Congress, but it is impossible to predict whether they will be enacted.

If you're interested in establishing an MSA after 2000, you need to determine whether the program has in fact been extended and what the current eligibility requirements are. Contact an insurance agent or broker who handles health insurance. You can also find a directory of companies that offer MSA on the Health Insurance Association of American website at <http://www.hiaa.org/cons/medical.html>. Call one or more of these companies to see if they are still offering MSAs.

COVERAGE FOR PREGNANT WOMEN AND OLDER WORKERS

Federal law provides some special insurance requirements for pregnant women and older workers.

Women. *You must treat women affected by pregnancy and related conditions the same as other employees based on their ability or inability to work. For example, if a woman can't work because she's pregnant, you must provide her with the same healthcare coverage as you generally provide to employees who become ill or have a disability. The Family and Medical Leave Act allows workers to take up to 12 weeks a year of unpaid leave connected with childbirth, adoption and foster placement.*

Older Workers. *You must offer workers age 40 and older the same healthcare coverage you offer to younger workers—and, if your plan requires that all your workers be covered, you can't make older workers pay more to join. But if the insurance isn't mandatory, older workers can be charged more, so long as actuarial charts show their healthcare costs are higher.*

Excerpted from the "*The Employer's Legal Handbook*", by Fred S.
Steingold

Chapter 5 – Health & Safety

As an employer, there are many good reasons—in addition to your humane instincts—for creating a safe and healthy workplace. Obviously, healthy workers will be happier and more productive. There will be fewer disruptions of work schedules due to absenteeism. And health insurance costs may be reduced. An incidental benefit may be an improvement in worker efficiency; workers generally are more efficient in a safer workplace. Then there are the more obvious obligations. Federal and state laws and an increasing number of local ordinances require you to take steps to make the workplace safe and healthy.

Workers today are well informed about the link between workplace conditions and health problems. Most know, for example, that secondhand smoke can cause or aggravate respiratory and heart problems, and that repetitive motions can lead to Carpal Tunnel Syndrome. And an increasing number of workers will not hesitate to press legal claims against employers who fail to rectify unsafe or unhealthy conditions.

In addition to health and safety statutes, state law requires your business to provide workers' compensation coverage to pay for medical bills and partial wage loss when an employee is injured in the workplace. By reducing on-the-job injuries and eliminating the workplace causes of disease, you can lower the cost of workers' compensation coverage.

Get Employees Involved:

In meeting your legal responsibilities for keeping the workplace safe and healthy, don't overlook an obvious resource: the workers. Involve them in identifying safety and health problems and suggesting ways to solve such problems. Organizing a safety committee made up of equal numbers of employees and managers is a good starting point. If workers can voice their safety concerns to you and to other workers who are able to initiate changes, there's less chance that they'll jump the gun and go straight to government authorities to report a complaint. Having such a safety committee can also earn you a break on workers' compensation insurance premiums. To further involve workers, consider holding company safety seminars at which you encourage employee suggestions.

Copyright © 1999-2001 Nolo.com All Rights Reserved

A. The Occupational Safety and Health Act

In 1970, Congress passed the Occupational Safety and Health Act or OSHA (29 U.S.C. §§651 to 678)—a comprehensive law designed to reduce workplace hazards and to improve health and safety programs for workers. It broadly requires employers to provide a workplace free of physical dangers and to meet specific health and safety standards. Employers must also provide safety training to employees, inform them about hazardous chemicals, notify government administrators about serious workplace accidents and keep detailed safety records.

Although there can be heavy penalties for not complying with OSHA, such penalties are usually reserved for extreme cases in which workplace conditions are highly dangerous and the employer has ignored warnings about them. If your workplace is inspected—an unlikely event for a typical small business—OSHA will work with you to eliminate hazards.

1. Who Is Covered

Generally, you must comply with the Act if your business affects interstate commerce. The legal definition of interstate commerce is so broad that almost all businesses are covered. But Congress did make some very limited exceptions. OSHA won't apply to your workplace if:

- you're self-employed and have no employees
- your business is a farm that employs only your immediate family members, or
- you're in a business such as mining, which is already regulated by other federal safety laws.

2. Safety Standards

OSHA sets a general standard for all covered businesses. As an employer, you must provide a place of employment that's "free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees." Recognized hazards are not clearly defined, which can make it difficult for you to know how to comply with the law. The broad language covers an almost impossibly large range of potential harm—from sharp objects that might cause cuts to radiation exposure.

But there's more. In the Act, Congress created the Occupational Safety and Health Administration—also called OSHA—as a unit of the U.S. Department of Labor. And Congress authorized this agency to set additional workplace standards, which it has done in great profusion. The specific standards cover a wide range of workplace concerns, including:

- exposure to hazardous chemicals
- first aid and medical treatment
- noise levels

- protective gear—goggles, respirators, gloves, work shoes, ear protectors
- fire protection
- worker training, and
- workplace temperatures and ventilation.

3. Posting, Reporting and Recordkeeping

You must post a notice called "Job Safety and Health Protection," which is available from the nearest OSHA office. If your business is located in a state that has its own approved OSHA program, there may be a state form for you to post instead of the national version. Check with your state OSHA office to find out.

You must notify OSHA within eight hours after learning that an employee has died from a job-related accident or that three or more employees have been hospitalized because of a workplace accident. Call or visit an OSHA office to report the location and time of the incident, the number of fatalities or hospitalized employees, the name and phone number of a contact person and a brief description of the incident. Expect a follow-up investigation.

Unless your business is exempt from OSHA recordkeeping requirements, you must maintain several types of records.

Injury and Illness Log. You must keep a log (OSHA Form 200) of all workplace injuries and illnesses, except minor injuries requiring only first aid. Throughout February, you must post the log for the previous year.

Medical Records. You must keep up-to-date medical records and records of employee exposure to hazardous substances or harmful physical agents.

Training Records. You must keep records of your safety training records and make them available for review by employees.

Retention. You must maintain required records for specified periods of time—sometimes as long as 30 years.

EXEMPTION FROM RECORDKEEPING:

The OSHA requirements for recordkeeping apply only to businesses with 10 or more employees—although state OSHA regulations may apply the recordkeeping requirements to smaller businesses. In addition, the following businesses are exempt from recordkeeping:

- *retail trade—except for businesses selling general merchandise, building materials and garden supplies*
- *real estate, insurance and financial businesses, and*
- *service businesses—except for hotels and other lodging places, repair facilities, amusement and recreation facilities and health services.*

Copyright © 1999-2001 Nolo.com All Rights Reserved

B. State OSHA Laws

If a state has a health and safety law that meets or exceeds federal OSHA standards, the state can take over enforcement of the standards from federal administrators. This means that all inspections and enforcement actions will be handled by your state OSHA rather than its federal counterpart.

So far, 23 states have been approved for such enforcement regarding private employers. They include: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington and Wyoming. (See the contact details below.)

New York and Connecticut also have OSHA-type laws, but they only apply to government employees. Other states are considering passing OSHA laws—and some of the above states are considering amending coverage and content of existing laws.

If your business is located in a state that has an OSHA law, contact your state agency for a copy of the safety and health standards that are relevant to your business. State standards may be more strict than federal standards, and the requirements for posting notices may be different.

Copyright © 1999-2001 Nolo.com All Rights Reserved

C. Hazardous Chemicals

The OSHA rules include a section called the Hazard Communication Standard. Many people call this the right to know law. Basically, the standard requires you to give information to your employees about the hazardous chemicals they handle.

The requirements of informing employees vary somewhat from state to state. If your business handles any chemicals, be sure to get a copy of your state's rules. Because most of the state laws are similar to the federal right to know rules, this discussion will focus on the federal law. If your state has standards that are more stringent than the federal ones, there are still some unresolved questions about whether you need only comply with the federal standards. Until this legal issue is clearly resolved, it's wisest to follow the stricter standards.

To understand the right to know laws—state or federal—you must first become familiar with the Material Safety Data Sheets (MSDS) supplied by manufacturers of all hazardous chemicals. They contain a wealth of information, including:

- the physical hazards of the chemical such as flammability and explosiveness
- health hazards—the symptoms of exposure and the medical conditions that can be made worse by exposure
- how the chemical enters the body and the limits of safe exposure
- whether the chemical is known to cause cancer
- how to safely handle the chemical
- recommended protection methods including protective clothing and equipment, and
- first aid and emergency procedures should a chemical be mishandled.

Obviously, if an employee is working with hazardous chemicals, this is essential information. That's why the law requires you to keep the MSDS for each hazardous chemical and make it accessible to employees. You must also keep a list of all the hazardous chemicals used in your business and label all containers. And you're required to train employees in the safe use of hazardous chemicals.

Example: Ace Water Treatment Corporation sells water treatment systems to rural homeowners whose water comes from underground wells. Ace issues demonstration kits to its sales staff so they can demonstrate to potential customers the extent of impurities in the homeowner's water supply. In one test, the salesperson adds a few drops of potassium hydroxide to a sample of the customer's water so that certain impurities will collect at the bottom of the test tube. Potassium hydroxide is a hazardous chemical sometimes known as lye.

The chemical comes from the manufacturer with an MSDS explaining its dangers and how it should be handled—for example, goggles should be used to protect the user's eyes. To comply with the right to know law, Ace keeps the MSDS and makes it available to employees. Ace makes sure that all containers are properly labeled, and that all employees are thoroughly trained in how to use and handle the chemical. To further protect its employees, Ace issues protective goggles to those who perform water tests using the chemical.

Copyright © 1999-2001 Nolo.com All Rights Reserved

D. Workers' Compensation

The workers' compensation system provides replacement income and medical expenses to employees who suffer work-related injuries or illnesses. Benefits may also extend to the survivors of workers who are killed on the job.

Workers' compensation is a no-fault system. The employee is entitled to receive stated benefits whether or not the employer provided a safe workplace and whether or not the worker's own carelessness contributed to the injury or illness. But the employer, too, receives some protection because the employee is limited to fixed types of compensation—basically, partial wage replacement and payment of medical bills. The employee can't get paid for pain and suffering or mental anguish.

To cover the cost of workers' compensation benefits for employees, you'll usually need to pay for insurance—either through a state fund or a private insurance company. While self-insurance is a possibility in some states, the technical requirements usually make this an impractical alternative for a small business.

1. Coverage Requirements

Each state has its own workers' compensation statute. While the details differ from state to state, one thing is clear: If you have employees, you generally need to obtain workers' compensation coverage. Your state workers' compensation bureau can tell you about any legal requirements for informing employees of their rights—generally by displaying a poster.

State laws vary as to whether sole proprietors, partners and executive officers can or must be covered by workers' compensation. In some states, these owners and managers have the option of being covered or not. If you're in one of these states and you want this coverage—which will give you the same benefits as other workers who are injured—mention this when you apply for coverage through a state fund or a private insurance carrier.

Similarly, in some states, sole proprietors, partners and executive officers are automatically covered but you have the option of excluding them. Ask a representative of the state fund or private insurance carrier how to do this when you apply for coverage.

A few states require workers' compensation coverage only if you have three or more employees.

YOU'RE STILL LIABLE FOR INTENTIONAL TORTS:

While workers' compensation is the employee's exclusive remedy for most work-related injuries or illnesses, there's a major exception: injuries or illnesses caused by the intentional actions of the employer. An employee who can prove that your intentional actions caused an injury or illness can take you to court, seeking a full range of damages—including, for example, damages for pain and suffering as well as economic losses.

Obviously, if you or a supervisor were to physically assault an employee, that would qualify as an intentional action. But courts sometimes treat other workplace events as intentional, too. Suppose, for example, that to speed up production, you remove the safety devices from a dangerous machine. An employee is injured using the machine, but you continue to require workers to use the machine in its unsafe condition. You've probably set yourself up for an intentional injury claim because you know with "substantial certainty" that additional workers will be injured by that machine.

In that situation, injured employees would not be limited to their remedies under your state's workers' compensation law. They would be able to sue you and your business under traditional tort theories.

Rejecting Coverage Can Be a Mistake

In two states—New Jersey and Texas—workers' compensation coverage isn't mandatory for an employer. You can choose whether or not you want to secure workers' compensation insurance for your workplace. But if you opt not to and you're sued by an employee who claims to have been injured on the job by your negligence, you won't be able to use the employee's own carelessness as a defense. Therefore, most wise employers obtain workers' compensation, no matter where their businesses are located.

2. Arranging for Coverage

Some states allow an employer to self-insure—a process that typically requires the business to maintain a hefty cash reserve earmarked for workers' compensation claims. Usually, this isn't practical for small businesses. Most small businesses buy insurance through a state fund or from a private insurance carrier. If private insurance is an option in your state, discuss it with the insurance agent or broker who handles the basic insurance policy for your business. Often you save money on premiums by coordinating workers' compensation coverage with property damage and public liability insurance. A good agent or broker may also be able to explain the mechanics of a state fund where that's an available option or is required.

In most states that have a state-run workers' compensation fund, you have a choice of buying coverage from the state or from a private insurer. In the following states, however, you must purchase from the state fund: North Dakota, Ohio, Washington and West Virginia. In Wyoming, you must purchase coverage from the state fund if you are engaged in an "extra-hazardous" industry.

Insurance rates are based on the industry and occupation involved, as well as the size of the payroll. Your safety record can also influence the rate; if you have more accidents than is usually anticipated, your rate is likely to be increased.

3. Controlling Costs

Premiums are based on two factors: industry classification and payroll. If your premium is above a certain amount—\$5,000 in many states—your actual experience with workers' compensation claims will affect your premiums. Your rate can go up or down, depending on how your claims compare with other businesses in your industry. The number of claims filed by your employees affects your premium more than the dollar value of the claims. That's because if you have a lot of accidents, it's assumed that you have an unsafe workplace and the insurance company eventually will have to pay out some large claims. Here are some steps you can take to try to keep your workers' compensation costs down.

a. Preventing accidents

Emphasize safety in the workplace. Provide proper equipment, safety devices and protective clothing. Train and retrain your employees in safe procedures and in how to deal with emergencies. Set up a safety committee comprised of both managers and workers. Promote employee health by offering wellness and fitness programs.

b. Buying coverage wisely

Seek out a participating plan in which the insurance company pays dividends to its insured employers. It helps to find a solid company with a long history of paying dividends—but dividends are never guaranteed.

Consider being put on a retrospective rating plan which, unfortunately, isn't usually available to many small businesses. In such plans, the insurance company agrees to adjust your premium at the end of the year based on your actual claims experience. If you have a strong safety program, this program can be better for you than a dividend-type program—which generally looks at the insurance company's claims experience and not just the history of your business.

Make sure your business and your employees are properly classified. Don't let the insurance company mistakenly place your business in a class that pays a higher premium because of job hazards. And, since workers are also classified based on the nature of their work, check to see that the insurance company has classified them correctly.

Remove overtime pay from the payroll figures on which the insurance company calculates your premium.

c. Following Up

Use light duty or modified work assignments to help workers who have been injured on the job but are allowed back to work on a trial basis.

Monitor claims. If you learn that an employee seems to have recovered but is still accepting workers' compensation benefits, ask him or her for an explanation. If something still seems amiss, notify the insurance company or state fund.

4. Injuries and Illnesses Covered

As an employer, you needn't dig very deeply into the fine points of workers' compensation law. The state fund or private insurance company that covers your workplace will have its own lawyers resolve legal questions about whether a worker is entitled to compensation for a particular disability and, if so, how much the worker is entitled to receive. When a worker seeks to receive benefits that are questionable, these lawyers will challenge the employee in your behalf.

Still, as a well-informed employer, you may want to learn a bit more about how the system works. While workers' compensation law varies somewhat from state to state, there's enough similarity among the states to justify some general statements.

To be covered by workers' compensation, an employee's injury needn't be caused by a sudden accident such as a fall. Basically, any injury that occurs in connection with work is covered. Many workers, for example, receive compensation for repetitive motion injuries such as Carpal Tunnel Syndrome, which primarily afflicts the wrists, hands and forearms.

In theory, if a worker's injury was intentionally self-inflicted or was caused by substance abuse or by some other nonwork cause such as a hobby, the injury won't be covered. But in a disputed case, the worker is

still likely to get the benefits by showing that his or her behavior wasn't the only thing that caused the injury.

Workers may also be compensated for some illnesses and diseases. An illness is likely to be covered by workers' compensation when the nature of the job increases the workers' chances of suffering from that disease. Illnesses that are the gradual result of work conditions—for example, emotional illness, heart conditions, lung disease and stress-related digestive problems—increasingly are being covered by workers' compensation.

Finally, there are death benefits. Dependents of workers killed on the job can usually collect workers' compensation benefits.

Don't Penalize Workers Who File Claims

In most states, it's a violation of the workers' compensation statute or public policy to discriminate against an employee for filing a workers' compensation claim.

5. Benefits Paid

Workers' compensation covers the employee's medical and rehabilitation expenses. It also provides income to the employee to offset a big part of lost wages. Typically, a worker receives two-thirds of his or her average wages up to a fixed ceiling. But since these payments are tax free, a worker who receives average wages fares reasonably well.

In most states, workers become eligible for wage loss replacement benefits as soon as they've lost a few days of work because of an injury covered by workers' compensation. The number of days required to qualify varies by state. Some states allow the payments to be paid retroactively to the first day of wage loss if the injury keeps the employee out of work for an extended period.

Workers may receive lump sum benefits if they have a total disability or a permanent partial disability. In some states, there are specific amounts provided for permanent partial disability such as the loss of an eye or a foot.

6. Independent Contractors

Workers' compensation insurance is required only for employees—not for independent contractors who work for you. Small businesses sometimes buy services from independent contractors to save money on workers' compensation insurance, as well as taxes and other expenses normally associated with employees. That's fine as long as you correctly label people as independent contractors rather than employees. But if you make a mistake, and a person improperly labeled as an independent contractor is injured while doing work for your business, you may have to pay large sums to cover medical bills and lost wages which should have been covered by workers' compensation insurance.

In addition, you can sometimes have a problem with a properly classified independent contractor who hires employees to perform some work for you. The trouble can come if the independent contractor doesn't carry workers' compensation insurance.

Require Proof of Insurance

When hiring an independent contractor, ask to see an insurance certificate establishing that the independent contractor's employees are covered by workers' compensation insurance. For good measure, make sure too that the independent contractor has general liability insurance.

Copyright © 1999-2001 Nolo.com All Rights Reserved

Excerpted from the "*The Employer's Legal Handbook*", by Fred S. Steingold

Chapter 6 -Termination

Firing an employee has always been an uncomfortable task, but it used to be clearcut—and relatively free of legal complications. You simply paid the former employee for accrued wages plus any earned but unused vacation time to which the employee was entitled.

Things are more complicated now. Firing someone—even a person who is demonstrably incompetent—can be a risky endeavor. Do it for the wrong reason or in the wrong way and you can be obligated to pay substantial money in damages, or to rehire the worker.

In firing employees, you must beware of potential legal sticking points. For example, a former employee who believes that he or she was fired in retaliation for reporting a workplace hazard to OSHA may have

legal grounds for filing a claim against you. And, in some situations, an employee who asserts that your employee handbook amounted to a contractual guarantee of job security may be found to have a valid claim.

As a result of these and other exceptions to the at-will employment principle, lawsuits by former employees against their former employers have increased. And despite the fact that many employees have been fired for valid reasons, some of them have won cases based on illegal firing simply because the employer was sloppy in terminating the employment relationship.

For a more in-depth discussion of how to fire employees without running afoul of the law or harming your business, see *Firing Without Fear*, by Barbara Kate Repa (Nolo).

Copyright © 1999-2001 Nolo.com All Rights Reserved

A. Wrongful Discharge Cases

Cases in which former employees claim that they were terminated for an improper reason or that an employer bungled the process are known as wrongful discharge cases—and they're based on a number of legal theories. You can better avoid being sued for wrongful discharge if you grasp these theories. Because state laws and court decisions vary in this area, not all of the legal theories for wrongful discharge will be available to all former employees. Also, since the law can change—and many recent changes favor workers, not employers—you need to keep up to date on the specific rules in your state.

Many state trade associations publish newsletters or magazines to help keep their members informed of changes in employment law. Your state chamber of commerce may also have helpful publications on this subject.

1. Statutes

If you discriminate illegally in firing an employee, a statute may give him or her the right to base a wrongful discharge case against you on that ground. Other statutes prohibit firing an employee for specified reasons, unrelated to discrimination. The main statutes that employees rely upon in asserting wrongful discharge claims are described here.

a. Race, color, religion and national origin discrimination

Under federal law—and many state statutes as well—it's illegal to discriminate against workers based on race, color, religion or national origin. These same statutes make it illegal to retaliate against a worker who complains about discrimination or who otherwise asserts his or her rights under the statute.

b. Age, gender and pregnancy discrimination

Additional federal and state statutes bar discrimination based on age, gender and pregnancy. These same statutes make it illegal to retaliate against a worker who complains about discrimination or who otherwise asserts his or her rights under the statute. And discrimination based on sexual orientation is also prohibited in a growing number of states, cities and counties.

c. Sexual harassment

Sexual harassment is a form of illegal discrimination covered primarily by statutes prohibiting sex discrimination.

d. Disability discrimination

The Americans With Disabilities Act bars discrimination against people with physical or mental disabilities. It also bars retaliation against people who complain about discrimination or who otherwise assert their rights under the statute.

e. Refusal to submit to lie detector test

A federal law, the Employee Polygraph Protection Act, makes it illegal to fire an employee for refusing to take a lie detector test. Many state laws also set out strong prohibitions against using lie detector tests in employment decisions.

f. Alien status

The Immigration Reform and Control Act requires you to verify that an employee is eligible to work in the United States. But you can't use alien status as a reason to fire a worker who is legally eligible to work

here.

g. Complaining about safety or health conditions

Under the Occupational Safety and Health Act, you can't fire (or otherwise retaliate against) someone for complaining that working conditions fall short of complying with state or federal safety and health rules.

2. Court Decisions

Wrongful discharge lawsuits are not always based on statutes. Many courts have awarded wrongful discharge damages to former employers for nonstatutory or common law reasons. The main ones are discussed here.

a. Breach of contract

Employers sometimes make promises to job applicants to entice them to become employees. And some employers may also dangle inducements in front of current employees to discourage them from leaving. A number of judges have ruled that if a person relies on such promises, an enforceable contract of employment has been created. An employer may be held liable for wrongful discharge if the employee is fired in violation of that contract.

Example: Betty, a diligent worker at AutoTec, is offered a job by a rival employer. She declines the job after AutoTec's president tells her she'll have a job for life at AutoTec if she continues to effectively manage her workload. Three years later, AutoTec fires Betty even though she has kept up with her work. Betty sues for wrongful discharge, claiming AutoTec violated its employment contract with her by firing her.

Specific promises of job security—either written or oral—are not always necessary for a judge to rule that an employee can't be fired arbitrarily. Some judges have allowed fired employees to collect damages or be reinstated to jobs because the employer created a legitimate expectation that employees wouldn't be fired without good cause. The typical focus in these cases is on inferences of job security made by the employer in a written document such as an employee handbook. It, too, may be enforced as a contract.

Example: After six months on the job, Tom is fired from his job at Syspro, a small software house. He sues for wrongful discharge, claiming that Syspro's employee handbook led him to believe that he'd only be fired for good cause—and that, in fact, Syspro fired him without a good reason. The judge agrees that it was reasonable for Tom to conclude, after reading the employee handbook, that his job was secure. The court rules that the employer's wording of the handbook constituted an implied contract.

b. Breach of good faith and fair dealing

A few wrongful discharge cases have been based on the premise that every employment relationship includes an automatic commitment by the employer to deal fairly and in good faith with the employee. Applying this doctrine, judges have held that a discharge was wrongful when an employer has dealt arbitrarily with an employee. Almost all of these cases have involved longtime employees who were fired as they neared retirement age.

Example: Rita has worked for Jones Enterprises for nearly 25 years. The company fires her just three months before her retirement benefits are to become permanent. In a wrongful discharge case against Jones, the judge finds that the company fired Rita to save itself the expense of paying her the full benefit of her retirement program. The judge rules in Rita's favor because the firing breached the implied covenant of good faith and fair dealing.

c. Violation of public policy

Judges sometimes rule that a firing was wrongful because it was against the best interests of the public. Most courts do not allow an employer to fire an employee, for instance, because he or she was trying to correct a potentially harmful business practice.

Example: Clinical Lab Center, a small company that processes blood tests for doctors, fires Joe, a medical technician, because he has twice complained to management that the inadequate testing of blood samples by other technicians has led to many inaccurate test results. A judge rules that Joe's firing was wrongful because it violated public policy.

Workers, the judge notes, should be free to speak up about sloppy practices they find on the job—especially those affecting public health or safety.

Courts have held that it's against public policy to fire a worker for refusing to file phony reports with a state environmental agency, bribe public officials, commit perjury or engage in industrial espionage. Courts have also held that it is against public policy to fire an employee for refusing to commit an illegal act or for threatening to report an employer's illegal conduct.

Copyright © 1999-2001 Nolo.com All Rights Reserved

B. Guidelines for Firing Employees

Even though your motives in firing someone are completely honorable and legitimate, the action may remain legally risky business. But there are several steps you can take to greatly reduce the chances of a former employee suing your business and being awarded a judgment against you.

1. Contractual Commitments

Before you fire an employee, check into whether you've made an oral or written contractual commitment that may limit your right to fire. Consider the following:

- Is there a written or oral contract or document (including a hiring letter) that promises the employee a job for a fixed period of time?
- When you hired the employee, did you make any oral commitments about job security?
- Have you assured the employee that you'd only fire him or her for good cause?
- Have you listed causes for termination—in a contract, employee handbook or elsewhere—in a way that limits you to those specified causes?
- Does your employee handbook or other written policy or memo make any promises about job security?
- Does your company have written or customary procedures that must precede firing?

Your answers to these questions will help you identify whether you've limited your ability to fire the individual. Even if you are positive that you have never given the employee any assurances of job security—either oral or written—you should still proceed with caution, especially when dealing with an employee who has been with your business for a number of years. Some courts have held that a long employment relationship can imply assurances of job security, which in turn can imply an employment contract that limits your ability to fire the employee. If an employee has only been working for you for a few months—or even for a year—you probably don't have to worry about this issue. If the employee has been with your business for, say, 15 years, however, you should be careful. If you don't have a really good reason for firing the employee, consider consulting an attorney before taking action.

Employment contracts can be a two-way street. While they may limit your right to fire an employee, the flipside is that they usually spell out the employee's obligations to your business. If the employee isn't performing well, chances are that he or she is in breach of the contract, giving you the legal right to terminate the relationship. Because the interpretation of contract terms can involve legal subtleties, consider having a brief conference with a lawyer before firing an employee who has a written contract.

SAY WHAT YOU MEAN AND MEAN WHAT YOU SAY:

The words you use in hiring someone and in writing an employee handbook can create a contractual commitment that you didn't anticipate. Your employee handbook and similar documents should reserve your right to terminate employees at your discretion. While you may also wish to list some specific types of conduct that will result in termination, such as dishonesty or excessive absenteeism, those shouldn't be stated in a way that implies they are the only ways to end the relationship. Also, your handbook and other communications with employees should not make any promises about long-term job security. If they do, it's time for a rewrite.

2. Lawful Reasons for Firing

To head off the possibility that an employee may try to base a wrongful termination action on alleged illegal conduct or motives in your workplace, be prepared to show the real reason for the firing.

Reasons that may support a firing include:

- performing poorly on the job
- refusing to follow instructions
- abusing sick leave

- being absent excessively
- being tardy habitually
- possessing a weapon at work
- violating company rules
- being dishonest
- endangering health and safety
- engaging in criminal activity
- using alcohol or drugs at work
- behaving violently at work
- gambling at work, and
- disclosing company trade secrets to outsiders.

Depending on the nature of your business, you may have other legitimate reasons to fire employees as well. Whatever reasons you use as a basis for firing people, it's absolutely essential that you treat your employees evenhandedly. That is, if you regularly let some employees engage in prohibited conduct, you'll be on shaky legal ground if you claim good cause for firing others for the same reason.

Example: Andrew, a black patient attendant, is a half-hour late for work three days in a row. His employer, a medical clinic, fires him. In suing for wrongful discharge based on illegal discrimination, Andrew shows that two white attendants had been similarly tardy in recent weeks, but received only a verbal warning to shape up. Even though excessive tardiness is a valid business reason for firing someone, the jury awards damages to Andrew because the employer applied the rules unevenly and unfairly.

Getting Help Before Firing a Violent Employee

Almost always, if an employee behaves violently or makes threats in the workplace, that will constitute a valid reason to fire him or her. After all, you need to protect other employees as well as customers and others likely to come into contact with the violent person. Yet, judges in a few cases have suggested that a violent or threatening employee may be entitled to some latitude or accommodation if the violent behavior stems from a mental or emotional disorder.

On balance, it's generally best to proceed decisively and fire the violent employee—as humanely as possible, of course. You may, however, want to confer in advance with an experienced employment lawyer to reduce the likelihood of later legal entanglements.

Copyright © 1999-2001 Nolo.com All Rights Reserved

C. The Firing Process

Where possible, give employees ongoing feedback about job performance, conduct formal job evaluations once or twice a year and impose progressive discipline. Ideally, a firing shouldn't come suddenly or as a surprise.

When you've reached the point where firing an employee is the best or only option, you must mind some legal strictures as you carry out the firing.

Speedy Action is Sometimes Appropriate

There can be situations in which moving quickly to fire someone—without a warning—may be the best course. For example, if your delivery truck driver is convicted of drunk driving, it makes sense to get rid of the driver. Similarly, you shouldn't feel it necessary to give advance warning to a bookkeeper who has embezzled money from your company. In general, use your judgment and err on the side of giving an employee a chance to correct a problem. But in extreme circumstances, don't hesitate to act quickly.

1. Severance Packages

Many employers and employees wrongly believe that every fired employee is legally entitled to severance pay. The truth is that you must only give severance pay when it's required by a contract with the employee. Still, in some cases, you may wish to offer severance pay and other benefits to help cushion the impact of a firing—and alleviate ill will.

If you're inclined to offer a severance package, it makes sense to be more generous with longtime employees than with those who have been with you just a year or two. For a short-term employee—someone who's worked for you for two years, for example—you might offer one month's pay plus payment of health insurance premiums for 90 days. For an employee who's been on your payroll for 15

years, it would be reasonable to offer six months of salary plus one year's worth of paid health insurance premiums.

You can be creative in putting together a severance package. The benefits you may wish to consider include:

- severance pay
- continuation of employee benefits, such as payment of health insurance premiums for a limited time
- a favorable letter of reference if your normal policy is to give only a former employee's position and term of employment
- releasing the employee from special obligations such as a covenant not to compete
- allowing the employee to keep any advance of expense funds or commissions that otherwise would be repayable to your business
- allowing the employee to keep the desk, chair, computer, cellular phone or tools that he or she has been using
- agreeing not to contest the employee's right to unemployment compensation
- paying for outplacement services, and
- promising to pay an employee's moving expenses, up to a stated limit.

Also, consider paying the employee for unused vacation time that the employee would otherwise lose. Normally, the conditions under which an employee will be compensated for unused vacation time are a matter of policy to be set by an employer—but you can bend that policy to benefit a departing employee.

Example: Alpine Ski Shop pays its employees for two weeks of vacation time each year, but states in its employee's handbook: "You must take your vacation during June, July or August and while you are on Alpine's payroll. Vacation time not used during that period will be forfeited unless you secure prior approval." Employee Kurt takes one week of his vacation in July and doesn't ask for permission to take the second week later. In October, Alpine fires Kurt because of an attitude problem. As part of a severance package, Alpine pays Kurt for the unused week of vacation time.

Paying for Vacation Time May Be Mandatory

In some states, the law doesn't allow an employer to set a policy forcing employees to forfeit unused vacation or sick time once it has accrued. In such states, the accrued vacation or sick time is treated as wages and must be included in an employee's final paycheck. The key legal issue is whether the vacation time has accrued. Check with the state department of labor to learn how much latitude you have regarding payment for vacation and sick time.

2. Preparing the Paperwork

Before you fire an employee, prepare a letter describing the severance package you intend to offer. And if you want the employee to waive possible legal claims against your business to qualify for the severance benefits, consider preparing a severance agreement as well.

For a release to be enforceable, you must offer the employee something of value in exchange for giving up his or her possible claims against your business. The severance package in the sample agreement satisfies this legal requirement.

Also, give the employee a reasonable time—three or four business days, for example—to decide whether to accept your severance package and sign the severance agreement containing a release of claims. A coerced release is legally worthless.

Special rules apply if the employee is releasing claims under the Age Discrimination in Employment Act. If you present a release to an individual employee who's 40 years old or older, you must give the employee a fixed period of time in which to decide on signing the waiver. That period must be at least 21 days if the waiver has been presented to the employee alone. If you've presented the waiver to a group or class of employees, you must give each worker at least 45 days to decide whether or not to sign. In either case, a worker has seven days after agreeing to such a waiver to revoke his or her decision.

3. Return of Property

In planning for the termination meeting, make a list of all company property that has been given to the employee. Be prepared to get back these items from the employee either at the meeting or within a reasonable time afterward. Items to think about include:

- automobiles
- computers, cellular phones and beepers

- confidential manuals and other documents
- keys, credit cards, uniforms, ID badges, and
- parking permits.

Don't overlook any expense account funds you advanced to the employee. You may be entitled to deduct such advances from the employee's final paycheck.

4. The Termination Meeting

Call the employee into a private office or meeting room and inform him or her of your decision. Be honest and direct in stating your reasons for ending the employment. If you've given the employee ongoing feedback, the firing shouldn't come as a complete shock. Make it clear that this is a final decision and that you're not going to change your mind. Unless the employee is likely to be a menace in the workplace, allow a day or so—but no longer—to clear out his or her desk and say goodbye to co-workers.

The Right to Have a Co-Worker Present

All employees have the right to have a co-worker present with them at investigatory interviews or meetings that the employee believes will result in disciplinary action from their employer. Disciplinary action could include termination.

This right is called a Weingarten right after a U.S. Supreme Court decision. (To read that decision—NLRB v. J. Weingarten, 420 U.S. 251 (1975)—go to Nolo's Legal Research Center at <http://www.nolo.com>.) That decision only gave the right to employees who were members of a union. In 2000, however, that right was expanded to nonunion employees as well.

Although no court has held that employers have an affirmative duty to inform employees of this right, it's prudent to do so—and to allow the employee to have a witness by his or her side.

COMMON SENSE CAN HELP AVERT VIOLENCE:

You may have zeroed in on scary newspaper headlines about disgruntled former employees who open fire on former employers. The actual incidence of such violence is quite low. Still, it pays to be prudent.

Violence following a firing is most apt to occur in a workplace where there are high levels of stress, autocratic and unpredictable managers, poor communication and employees who feel powerless.

Be especially careful if you're firing an employee for performing poorly—a charge that may be emotionally loaded. Some workers who are fired without warning can go over the edge because they feel there was nothing they could do to control the situation. In giving feedback before a firing, let workers know if their performances are below par—and focus on the specific ways in which job performance falls short of the mark. Warn workers that they may lose their jobs if they don't improve.

At a termination meeting with a potentially volatile employee, confine your discussion to the specific behavior about which the employee was warned. Never attack the worker personally. Remind the worker that he or she was given fair warning and an ample opportunity to change work habits.

Let the fired employee know that you won't be discussing the reasons for the firing with his or her former co-workers and that you're prepared to give a neutral letter of recommendation to prospective employers who inquire. This will help preserve the employee's self-esteem, making violence unlikely.

Troubled employees often exhibit behavioral clues that you shouldn't ignore: high absenteeism, known substance abuse, chronic tardiness, and harassing and threatening others. If you're about to fire someone who appears to have a potential for violence, consider consulting first with a psychologist who specializes in workplace issues.

Copyright © 1999-2001 Nolo.com All Rights Reserved

Excerpted from the "*The Employer's Legal Handbook*", by Fred S. Steingold